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IN THE

**Supreme Court of the United States**

ALEXANDER L. STEVAS,  
CLERK

OCTOBER TERM, 1982

THE SEATTLE TIMES COMPANY, a  
Delaware corporation, d/b/a  
THE SEATTLE TIMES; WALLA WALLA  
UNION-BULLETIN, INC.; ERIK  
LACITIS and JANE DOE LACITIS;  
JOHN WILSON and REBECCA WILSON;  
JOHN MCCOY and KAREN MCCOY,

*Petitioners,*

v.

KEITH MILTON RHINEHART, a single  
person; the AQUARIAN FOUNDATION,  
a Washington not-for-profit  
corporation; KATHI BAILEY, a  
married person, LILLIAN YOUNG,  
a married person, TONI STRAUCH,  
a married person, SYLVIA CORWIN,  
and ILSE TAYLOR, representing  
women who were members of the  
Aquarian Foundation on or after  
March 17, 1978,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF  
THE STATE OF WASHINGTON**

**PETITION FOR A WRIT OF CERTIORARI**

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April 22, 1983

## **QUESTIONS PRESENTED FOR REVIEW**

1. Whether it is constitutional under the First and Fourteenth Amendments for a court to prohibit publication of information learned in the course of civil discovery in the absence of either a showing of specific harm caused by publication or a particularized examination of the need for a restriction upon publication.

2. Whether it is constitutional under the First and Fourteenth Amendments for a court to enter an order prohibiting publication of information learned in the course of civil discovery upon a mere showing of "good cause."



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The petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on December 2, 1982.



## OPINION BELOW

The opinion of the Washington Supreme Court is reported at *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), and is found in the Appendix at pages 7a through 56a.

## JURISDICTION

The judgment and opinion of the Washington Supreme Court was entered on December 2, 1982. A timely motion for reconsideration was denied by the Washington Supreme Court on January 27, 1983. The Petition for a Writ of Certiorari has been filed within 90 days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*U.S. Const.*, amend. I.

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*U.S. Const.*, amend. XIV, § 1.

The case also involves portions of Civil Rule 26(c) of the Washington Rules for Superior Court, which provides as follows:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. . . .

Wash. CR 26(c).

### STATEMENT OF THE CASE

On February 15, 1980, Keith Milton Rhinehart, head of the Aquarian Foundation, the Foundation, and certain members of the Foundation commenced an action for defamation and invasion of privacy against petitioners, who include two daily newspapers, The Seattle Times, the Walla Walla Union-Bulletin, and several journalists currently or formerly employed by those newspapers.<sup>1</sup>

<sup>1</sup> Other than wholly-owned subsidiaries, there are no parent companies, subsidiaries, or affiliates of the Seattle Times Co. and the Walla Walla Union-Bulletin, Inc. See Rule 28.1, Sup. Ct. R.



The complaint, filed in King County Superior Court in Seattle, alleged that defendants had falsely and with actual malice portrayed Rhinehart as a religious and financial charlatan. Plaintiffs also contended that the newspapers' coverage of their activities had damaged their reputations, created shame, humiliation and embarrassment among certain individual members of the Foundation, caused a loss in Foundation membership, increased the Foundation's expenses, impaired Rhinehart's ability to communicate with Foundation members, and caused a decline in anticipated contributions and donations from members and from the general public.

The complaint sought damages as a result of alleged newspaper statements that Rhinehart was a leader of a "bizarre Seattle cult" who was "unfit to be a religious leader," that Rhinehart's public exhibitions were "consciously perpetrated frauds" and his seances a "ripoff," that the Foundation was, in fact, Rhinehart's "alter ego" with "no segregation of money or contributions" between them, that the Foundation used its "wealth to buy religious converts," and that the Foundation had accumulated its fortune "by selling fraudulently-produced stones" to the public for outrageous sums. Rhinehart also claimed defamation and invasion of privacy arising out of the newspapers' mention of his criminal record and their descriptions of a public performance that he staged for inmates at the state penitentiary in Walla Walla.

The order in question arose as a result of defendants' efforts to obtain discovery from Rhinehart and the other plaintiffs about the allegations contained in their complaint, including their damage claims. Plaintiffs refused to provide certain requested information, including any material relating to the damage claim about loss of membership and contributions to Rhinehart and the Foundation.

Defendants moved for an order compelling discovery. Rhinehart resisted the motion. He also sought a protective order which would forbid defendants from publishing any information about him and his co-plaintiffs acquired during the course of litigation.

On January 8, 1981, The Seattle Times submitted a brief in opposition to Rhinehart's effort to obtain entry of a protective order against publication. Defendants argued that entry of the proposed protective order would be a violation of the First and Fourteenth Amendments to the Constitution and thus raised the federal question in a timely fashion. Rhinehart responded with a legal memorandum claiming that only a bare minimum of "good cause" need be demonstrated for such an order to issue under CR 26(c) of the Washington Rules for Superior Court.

On June 12, 1981, the trial court issued an Opinion Granting Plaintiffs' Motion for Protective Order. (App. 1a-4a.) In that opinion, the court expressly rejected defendants' First Amendment arguments and concluded that Rhinehart had shown "reasonable grounds" for the issuance of an order prohibiting defendants from publishing any information learned in discovery about plaintiffs' "financial affairs," the names and addresses of present or former Foundation members, clients, donors, or contributors, as well as the names and addresses of all those who had provided money or other gifts to Rhinehart. As the basis for its ruling, the trial court noted that protective orders "are entered routinely . . . where the party seeking the Protective Order has a reasonable basis for its request." The court observed that protective orders were adopted "in the first place" to promote "production of information normally kept confidential." Thus, the court reasoned, if such orders were "not available, it could have a chilling effect on a party's willingness to bring his case to court." (App. 2a, 4a).

As a result, on June 26, 1981, the trial court entered the Protective Order. (App. 5a-6a). The order listed certain categories of information that defendants "shall make no use of . . . other than such use as is necessary in order to . . . prepare and try the case." The order also declared broadly that "information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination." (App. 6a). The order contained no restriction on its duration or its application to materials revealed in open court.<sup>2</sup>

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<sup>2</sup> The Superior Court simultaneously entered an Order Compelling Discovery, which was the subject of a separate appeal by plaintiffs and was subsequently upheld by the Washington Supreme Court in its decision on December 2, 1982.

Defendants immediately filed a Notice for Discretionary Review, asking for interlocutory review of the Protective Order. On July 27, 1981, the Washington Court of Appeals concluded that the issues should be considered in the first instance by the Washington Supreme Court. The Washington Supreme Court thereafter granted the motion for discretionary review and agreed to hear the case on an accelerated basis.

On December 2, 1982, the Washington Supreme Court issued its opinion upholding the order in question, an opinion which was thereafter amended by order of the Washington Supreme Court on December 13, 1982. (App. 7a-56a). Expressly rejecting defendants' First Amendment arguments, the court held that "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification" for the prior restraint in question. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 256, 654 P.2d 673, 690 (1982). A timely motion for reconsideration was denied on January 27, 1983. (App. 57a).

### REASONS FOR GRANTING THE WRIT

Review on certiorari is merited under Rule 17.1 of the Rules of the Supreme Court. The decision of the Washington Supreme Court departs from the decisions of this Court in permitting entry of a broad ban on expression in the absence of the specific factual findings needed to support such a ban. Moreover, by disregarding the First Amendment interest in disseminating information learned in civil discovery, the decision is in direct conflict with the First Amendment tests established by several federal courts of appeals and by another state court of last resort. Furthermore, the court below has decided the First Amendment standards that govern entry of a protective order prohibiting dissemination of information learned in civil discovery, an issue of federal law which has not been, but should be, expressly settled by this Court.

## I.

**THE DECISION BELOW DEPARTS FROM THIS  
COURT'S HOLDINGS IN SANCTIONING A BAN  
ON PUBLICATION WITHOUT ANY SHOWING OF  
SPECIFIC HARM CAUSED BY SUCH PUBLICATION**

**A. The Decision Offers Conjectural Justifications for the  
Protective Order.**

One of the chief vices of the decision below is that it curtails petitioners' exercise of First Amendment rights without any showing of specific harm caused by the publication in question. Instead of determining whether the ban on publication was properly justified in this particular instance, the Washington Supreme Court confines its inquiry to "the interests which justify a rule which authorizes protective orders *in circumstances such as these*." (App. 12a) (emphasis added). Having thus formulated the issue as a general proposition, the court arrives at a general conclusion that creates a blanket exemption:

We think it safe to say that because of their encroachment upon First Amendment rights of speech and press, if provisions such as these cannot be sustained, the result surely will be a serious undermining of the morale of the people as well as the integrity of government. Provisions such as these, like CR 26(c), express strong governmental policy, designed to protect valuable rights of private individuals as well as to further legitimate interests of the state. The court's endeavor should be to uphold such measures if possible, if it can be done without unduly invading some other protected right. . . .

(App. 19a-20a).

By thus adding speculation to conjecture, the court's analysis dispenses with any requirement that a specific harm be identified to justify this restraint. Instead, the court concludes that Wash. CR 26(c) recognizes "that parties generally are not eager to divulge information about their private affairs," that

"rather than expose themselves to unwanted publicity" some unidentified individuals "may well forego" litigation, and, therefore, that the "judicial system" would then make "utilization of its remedies so onerous that the people will be reluctant or unwilling to use it..." (App. 35a). As the dissent below rightfully observes, the decision reveals no attempt to "identify the specific harm in this case that warrants a protective order." (App. 55a) (Utter, J., dissenting).

Instead of undertaking a proper analysis to determine whether entry of *this* particular Protective Order is justified in *this* specific case, the Washington Supreme Court simply concludes that, as a general matter, there exists a "strong governmental interest" in the functioning of civil discovery proceedings that "makes it imperative that their integrity be preserved." (App. 34a). Thus, the decision below reveals no effort to analyze whether any specific and compelling state interest justifies this particular limitation on petitioners' First Amendment rights. "It is perhaps a matter of speculation," the court concedes, "as to what the effect will be in any given case." (App. 35a). As a result, the court adopts a blanket rule permitting entry of orders that prohibit expression without requiring the identification of any specific harm caused by such speech.<sup>3</sup>

**B. In *Nebraska Press* and *Gulf Oil*, this Court Mandated Specific Findings Before Entry of any Restraint on Expression.**

The court's reasoning conflicts with *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), in which this Court refused to permit entry of a restraint upon publication. Although the trial court was "justified" in finding that a sensational murder trial "would" generate "intense and pervasive pretrial publicity" which "might impair the defendant's right to a fair trial," the Court noted, such a conclusion was "of necessity speculative" because it dealt with "factors unknown and unknowable." *Id.* at 562-63. Where the evil sought to be

<sup>3</sup> Indeed, the decision is hostile to adopting any analytical framework for balancing the need for a protective order against the First Amendment interests at stake. For example, the court sharply criticizes the thoughtful opinion in *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471 (S.D.N.Y. 1982), for attempting to "enunciate restrictive criteria for the exercise of [its] discretion." (App. 27a).



prevented was purely speculative, this Court held, a state cannot constitutionally impose a ban upon publication:

Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here is not demonstrated with the degree of certainty our cases on prior restraint require.

*Id.* at 569. If the specific finding of an adverse impact of pretrial publicity upon a particular criminal defendant's Sixth Amendment rights was insufficient to justify a prior restraint in *Nebraska Press*, the Washington Supreme Court's wholly conjectural and generalized justification for such an order in a civil proceeding is even less supportable.<sup>4</sup>

The decision below also conflicts with this Court's recent decision in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). In *Gulf Oil*, this Court was faced with a federal court order that prohibited communications from named plaintiffs and their counsel to prospective class members during a pendency of a class action. Because of this Court's supervisory authority over the inferior federal courts, the decision did not reach the constitutional issues. Even so, the Court held that any order limiting such communications "should be based on a clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." *Id.* at 101. Citing *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979), the Court noted that such orders must be based upon "a particular and specific demonstration of fact. . . ." 452 U.S. at 102 n.16. The Court concluded that the record was devoid of "any indication of a careful weighing of competing factors" to determine "the need for this sweeping restraint order." *Id.* at 102.

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<sup>4</sup> As Justice Utter observes in his dissenting opinion below, the reasons advanced by the trial court, *i.e.*, that if protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court," likewise failed to identify any specific harm in this case that warranted this Protective Order. (App. 54a-55a) (Utter, J., dissenting).

*Gulf Oil*, this Court stated specifically that “the mere possibility of abuses [in class action litigation] does not justify routine adoption of a communications ban.” *Gulf Oil Co. v. Bernard*, *supra*, 452 U.S. at 104. The Court recognized that, in the conduct of a case, some limitation upon the freedom of expression of participants, including counsel, witnesses, and jurors, is often necessary. *Id.* at 104 n. 21. Nonetheless, entry of the order in question without a sufficient factual basis was an abuse of discretion. According to the Court:

We conclude that the imposition of the order was an abuse of discretion. The record reveals no grounds on which the District Court could have determined that it was necessary or appropriate to impose this order. Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

*Id.* at 104-05 (footnote omitted).<sup>5</sup>

### C. The Decision Also Conflicts with Rulings of the United States Courts of Appeals.

The decision below is also in direct conflict with decisions of the federal appellate courts governing the issuance of judicial orders restraining expression. For example, the Sixth Circuit, in *WXYZ, Inc. v. Hand*, 658 F.2d 420, 426 (6th Cir. 1981), relying upon *Nebraska Press*, concluded that mere “surmise or conjecture that untoward consequences may result” cannot justify a judicial restraint upon publication. Similarly, when a former business executive sought to enjoin a television broadcast, the Ninth Circuit concluded that such an order would be

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<sup>5</sup> The trial court below, like the court in *Gulf Oil*, issued the Protective Order because such orders “are entered routinely” and because, if they were “not available, it could have a chilling effect on a party’s willingness to bring his case to court.” (App. 2a-4a). As in *Gulf Oil*, therefore, the trial court made no findings that this particular order was required in this particular instance.

unconstitutional because of the absence of a specific showing of harm. *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904, 906-07 (9th Cir. 1978). See also *In re Halkin*, *supra*, 598 F.2d at 193 n. 42 ("mere allegation of conjectural harm is insufficient"). The concept of the "integrity" of the judicial process, as advanced by the court below, is a mere talisman and an improper substitute for the specific showing of harm required by *Nebraska Press*, *Gulf Oil*, and other decisions.<sup>6</sup>

#### D. Speculation Cannot Justify a Curb on Expression.

The generalized interests advanced by the trial court below and by the Washington Supreme Court cannot, under the applicable rulings of this Court, justify the broad restraint upon expression embodied in the Protective Order. See Rule 17.1(c), Sup. Ct. R. Neither the suggestion of hypothetical untoward consequences nor the vague vindication of judicial "integrity" promoted by the decision below constitutes an adequate basis for restraining the exercise of First Amendment rights. The Washington Supreme Court improperly ignored the rulings of this Court that such a restraint may be issued only upon specific findings that a particular limitation on speech and publication is required by compelling state interests.

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<sup>6</sup> Broad and generalized interests are always easier to advance and justify than are specific demonstrations of fact. However, in its decisions, this Court has steadfastly rejected a state's presumed "interest in maintaining the institutional integrity of its courts" as sufficient justification for punishment of freedom of expression, even where the restrictions did not include restraint upon publication. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978). As this Court recognized in *Bridges v. California*, 314 U.S. 252, 271 (1941), the general evil of "disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation." This Court has acknowledged "the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). As a result of publication, for example, witnesses might come forward who could contradict or impeach testimony proffered by Foundation members or provide additional information about Rhinehart's financial dealings. See *Globe Newspaper Co. v. Superior Court*, \_\_\_\_ U.S. \_\_\_\_, 102 S. Ct. 2613, 2620, 73 L. Ed. 2d 248, 256 (1982) (public scrutiny "enhances the integrity of the factfinding process"). See also *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979) (openness of court proceedings "may improve quality" of testimony and "induce unknown witnesses to come forward").



## II.

**THE DECISION BELOW REJECTS  
THE FIRST AMENDMENT TESTS APPLIED BY THE  
UNITED STATES COURTS OF APPEALS AND A STATE  
COURT OF LAST RESORT**

**A. The Court Concludes that the First Amendment Does Not  
Protect the Publication of Information Learned in Litiga-  
tion.**

The immediate effect of the order sanctioned by the Washington Supreme Court is the curtailment of petitioners' First Amendment rights of speech and publication regarding information obtained through discovery. In so doing, the court below embarks upon a major departure from the decisions of this Court, the federal appellate courts, and a state court of last resort. The court concludes that "the reporting of supposed facts elicited in discovery" is not protected by the First Amendment where such reportage is not characterized by "advocacy or abstract discussion" and involves no apparent "significance with respect to governmental activity." (App. 29a, 36a). As Justice Utter's dissenting opinion notes, such a position is "tantamount to holding discovery is an excepted category from First Amendment scrutiny—a position unsupported in the law." (App. 43a) (Utter, J., dissenting).

The opinion below asserts that civil discovery, by its very nature, involves confidential proceedings and court filings that are closed to outsiders, where secret testimony is elicited about pending lawsuits. Thus, with the possible exception of antitrust or similar litigation, the court implies that there is no legitimate public interest in information learned during the course of such proceedings. (App. 35a). To reach this broad and arbitrary conclusion, the court begins with the assumption that any public dissemination of information uncovered in pretrial proceedings is presumptively illegitimate. (App. 13a-16a). In assuming the propriety of the restraint, the court's analysis places upon petitioners the burden of justifying the propriety of exercise of First Amendment rights.

**B. The Court Repudiates the First Amendment Tests Adopted in *Halkin* and *San Juan Star*.**

By carving out a special exemption from the First Amendment for factual information acquired in the course of civil litigation, the decision below is at odds with the positions taken by various United States courts of appeals. Thus, the Washington Supreme Court expressly rejects (App. 37a) the holding of the United States Court of Appeals for the District of Columbia Circuit in *In re Halkin, supra*, which concluded that significant First Amendment interests attach to information acquired by a litigant during the course of civil discovery. The court in *Halkin* recognized that, although exacting prior restraint analysis might not be applicable, a ban on dissemination of discovery materials poses "many of the dangers of a prior restraint." 598 F.2d at 186. Thus, in order to protect the First Amendment interests in dissemination of such information, the court applied a three-part test to ensure that any protective order does not unnecessarily hamper protected speech:

The court must . . . evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

*Id.* at 191 (footnotes omitted). See also Note, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 Duke L.J. 766; Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645 (1980); Note, *The First Amendment Right to Disseminate Discovery Materials*, 92 Harv. L. Rev. 1550 (1979).

The Washington Supreme Court has explicitly adopted an interpretation of the First Amendment contrary to the careful approach articulated in *Halkin, supra*, 598 F.2d at 193, in which the court held that "naked speculation" was insufficient to support entry of an order prohibiting publication of discovery materials. Rather, a court must insist on "a concrete and

specific showing of the likelihood of harm" before it can constitutionally issue a protective order which restricts expression. *Id.* at n.42. The *Halkin* approach, cited favorably by this Court in *Gulf Oil, supra*, 452 U.S. at 102 n.16, requires specific findings to justify a serious restraint upon expression. The blanket rule, adopted by the court below, is an improper substitute. See also *Globe Newspaper Co. v. Superior Court, supra*, 102 S. Ct. at 2621-22, 73 L. Ed. 2d at 258-59 (state's justification for closure of criminal trial must be judged on case-by-case basis).

As part of its balancing test, the *Halkin* court required "a specific showing that dissemination of the discovery materials would pose a concrete threat to an important countervailing interest." 598 F.2d at 193. The court added:

The protection afforded expression by the First Amendment would be illusory if every conceivable threat to an important public interest, no matter how remote or speculative, were sufficient to justify a restriction of speech. . . .

*Id.* at 193 n.42. Significantly, as Justice Utter remarks in his dissent, the standards articulated by the decision below fail to satisfy even the test ordinarily applied to determine the propriety of protective orders that do not implicate First Amendment rights, which requires, at a minimum, "a highly particular and specific demonstration of fact" in order to justify entry of such an order. (App. 55a) (quoting *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974)).

The holding in *Halkin*, that information learned during civil discovery merited First Amendment protection, was based in part upon a long series of decisions in which this Court carefully delineated those specific categories of speech that are not accorded the usual First Amendment protection. These "well-defined and narrowly limited classes of speech," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), include so-called fighting words, *id.* at 572; obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973); and, to a limited extent, commercial

speech, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-63 (1980); and defamatory falsehoods, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). *Halkin* held that information acquired during the course of civil discovery simply cannot be characterized as "a class of utterances of 'no essential part of any exposition of ideas,' or of 'slight social value as a step to truth.'" *Halkin, supra*, 598 F.2d at 188 (quoting *Chaplinsky v. New Hampshire, supra*, 315 U.S. at 572). In rejecting *Halkin*, the Washington Supreme Court has arbitrarily created a new category not recognized by this Court—i.e., news coverage obtained from discovery of alleged religious groups that is deemed by a court not to serve the "interest of the public." (App. 36a).

The opinion below also explicitly repudiates (App. 37a) the decision of the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981), in which the court held that a newspaper's right of access to newsworthy matters learned during civil discovery embodies sufficient free speech interests to mandate "a 'heightened sensitivity' to the First Amendment concerns at stake." The court in *San Juan Star* recognized that "there is a First Amendment concern that the government not lightly engage in any restraints on communications," although, like *Halkin*, the court elected to scrutinize the restraints imposed by protective orders "under a less severe standard than that ordinarily applied to prior restraint." *Id.* 115. See also Comment, *In re San Juan Star: Discovery and the First Amendment*, 34 Baylor L. Rev. 229 (1982); Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085 (1981).

Because no restraint upon publication was involved, the court in *San Juan Star* imposed a slightly less stringent test from that formulated in *Halkin* but still recognized that significant First Amendment interests were implicated by an order restricting access to information acquired in civil discovery. *San Juan Star* adopted a test for "good cause" under Rule 26(c), Fed. R. Civ. P., that "incorporates a 'heightened sensitivity' to the First Amendment concerns at stake." 662 F.2d at 116. According to the First Circuit:

We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective

order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary.

*Id.* at 116. The court required that any proposed restraint be the least restrictive means of preventing the threatened harm and that the proponent of the restraint demonstrate, at least, a reasonable likelihood of the threatened harm occurring. *Id.* at 116-17.

### C. The Court's Reasoning Conflicts with other Federal Appellate Decisions.

The decision also conflicts with the reasoning of other federal appellate decisions. For example, in *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 420 U.S. 969 (1975), the court stated that judicial interest "in the proper administration of justice does not authorize any blanket exception to the First Amendment." According to the Sixth Circuit, the "mere status of involvement in a lawsuit" cannot undermine a party's First Amendment rights and First Amendment interests attach even to factual information learned during civil discovery. *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981). *Accord, CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975) (gag order of litigants is "presumptively void" under First Amendment).

The fact that Wash. CR 26(c) gives a trial court broad discretion over the discovery process does not alter these basic principles. According to the Fifth Circuit, a court rule providing for "general authority to regulate the conduct of litigation" cannot "create an exception to the principles governing prior restraints." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). As the Seventh Circuit noted in striking down a similar attempt to limit the First Amendment rights of litigants, "there are important areas of public concern connected with current litigation." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied sub nom., Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). *Accord, Chase v. Hobson*, 435 F.2d 1059, 1062 (7th Cir. 1970).



Other federal courts have adopted First Amendment tests directly at variance with the decision below. These decisions have repeatedly recognized the significant First Amendment interests that must be considered before issuing an order prohibiting dissemination of information learned in civil discovery. See, e.g., *Doe v. District of Columbia*, 697 F.2d 1115, 1118-21 (D.C. Cir. 1983) (reaffirming *Halkin* test); *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir. 1982), cert. denied sub nom., *Attorney General of Ohio v. Krause*, — U.S. —, 103 S. Ct. 54, 74 L. Ed. 2d 59 (1982) (applying *Halkin* test); *Koster v. Chase Manhattan Bank*, supra, 93 F.R.D. at 475-82 (recognizing First Amendment interests at stake); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 529 F. Supp. 866, 909 (E.D.Pa. 1981) (adopting *San Juan Star* formula); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (applying *Halkin* test); *Tavoulareas v. Piro*, 93 F.R.D. 24, 30 n.4 (D.D.C. 1981) (acknowledging flexibility in *Halkin* test); *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 425-27 (W.D.N.Y. 1981) (applying *Halkin* ); *Brink v. DaLesio*, 82 F.R.D. 664, 676-78 (D.Md. 1979) (applying *Halkin* ); *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 204 (S.D.N.Y. 1977) (applying prior restraint analysis); *Davis v. Romney*, 55 F.R.D. 337, 344-46 (E.D.Pa. 1972) (applying prior restraint standards). But see, *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (expressing "no doubt" about constitutionality of protective orders).

#### **D. The Presumption of Openness Reflects Important First Amendment Policies.**

Petitioners' First Amendment interests are judged illegitimate by the court below primarily because the publication of information acquired during the course of litigation allegedly would not promote the state's generalized interest in the administration of justice. Thus, the court gives short shrift to any exercise of First Amendment rights that does not serve, directly or indirectly, governmental interests:

As the Supreme Court has more than once remarked, the function of the media in serving not only the public's need to know but the integrity of governmental functions themselves is of great impor-

tance in balancing First Amendment rights against other interests of the state. Here, there is nothing to indicate the publicity given to the evidence furnished by a party in a pretrial proceeding will in any way tend to promote the proper functioning of such proceedings. . . .

(App. 36a). By contrast, the Seventh Circuit has stated:

That the effective exercise of First Amendment rights may undercut a given government policy on some issue is, indeed, one of the purposes of those rights.

*Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

The presumption of illegitimacy that the Washington Supreme Court attaches to any publication of information learned during civil litigation is premised upon an improperly restrictive view of the purposes and uses of civil litigation. As noted in *Halkin*:

Generally speaking, when a party obtains documents or information through the discovery process, he can "use that information in any way which the law permits." *Leonie Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955). *Accord Essex Wire Corp. v. Eastern Electric Sales Co.*, 48 F.R.D. 308, 312 (E.D. Pa. 1969). The discovery rules themselves place no limitations on what a party may do with materials obtained in discovery.

*Halkin, supra*, 598 F.2d at 188. Historically, courts have recognized as a basic premise of civil procedure that "discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Telephone & Telegraph v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (per curiam), cert. denied, 440 U.S. 971 (1979). *Accord, Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), cert. denied, 379 U.S. 900 (1964); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D.Ga. 1980). Civil litigation, including pretrial proceedings, is presumptively open. *See, e.g.*,

*Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1983); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, *supra*, 529 F. Supp. at 895.

Such decisions reflect a judicial recognition that civil litigation is a primary source of newsworthy information. As the Seventh Circuit has noted, "many important social issues" arise in the course of such litigation and, in fact, lawsuits themselves often serve the "purpose of gaining information for the public." *Chicago Council of Lawyers v. Bauer*, *supra*, 522 F.2d at 258. See also *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) (en banc) (per curiam). This Court has characterized civil litigation as a "means of communicating useful information to the public." *In re Primus*, 436 U.S. 412, 431 (1978). The First Amendment ensures the openness of judicial proceedings that enables the press "to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 492. The Court has repeatedly recognized the strong public interest in the open administration of justice. See *Globe Newspaper Co. v. Superior Court*, *supra*, 102 S.Ct. at 2618-20, 73 L.Ed.2d at 255-57 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); *Landmark Communications, Inc. v. Virginia*, *supra*, 435 U.S. at 838-39.

#### **E. The Decision Also Conflicts with the First Amendment Test of Another State Court of Last Resort.**

The decision below, moreover, is in direct conflict with another state court of last resort in its determination of the appropriate First Amendment standards to be applied to an order forbidding publication of information learned in civil discovery. In *Kuiper v. District Court*, 632 P.2d 694 (Mont. 1981), the Montana Supreme Court adopted the First Amendment test enunciated in *Halkin*, *supra*, in reversing a protective order in a personal injury action. The order had prevented one of the parties from using documents acquired in discovery for any extra-judicial purpose. The court held that because it "has a chilling effect upon First Amendment rights," such a protective order "must be subjected to close scrutiny" under the *Halkin* test to determine its constitutionality. *Id.* at 697-98. See also *Montana Human Rights Div'n v. City of Billings*, 649 P.2d 1283, 1290 (Mont. 1982) (reaffirming *Halkin* test).



**F. The Court's Analysis Rejects the Overwhelming Weight of Authority.**

The First Amendment analysis offered by the Washington Supreme Court in support of the Protective Order expressly repudiates the tests adopted by *Halkin* and *San Juan Star* to determine the constitutionality of such orders. The court's reasoning also conflicts with decisions of the various federal courts of appeals and with another state court of last resort, which have recognized that restraints upon publication should be permitted only after a careful and deliberate analysis of the competing interests and strict scrutiny of the justifications advanced by the proponent of the restraint. See Rule 17.1(b), Sup.Ct.R. By contrast, the Washington Supreme Court has arbitrarily determined that the public ought to have no further interest in newsworthy information about such a "bizarre" and "unorthodox" group:

We are not told what interest of the public is served by the newspaper's further exposure of this allegedly religious sect, unorthodox though it undoubtedly is, but we assume that publishers could rightly find it newsworthy. It may have some significance with respect to governmental activity, but, if so, that fact has not been brought to light. If the plaintiff and his associates are engaged in unlawful activities, it is safe to assume what with the exposure that has already been made, the appropriate law enforcement agencies will take action. In view of the fact that the discovery rules have a long history of functioning without exposure of litigants to unwanted publicity and at the same time the news media has flourished, giving extensive coverage to the bizarre and the unorthodox, we do not perceive that continued protection of the discovery proceedings will constitute a substantial impediment to news gathering in this area.

(App. 36a) (footnote omitted).

## III.

**THE DECISION BELOW IGNORES THIS COURT'S  
DECISIONS WHEN IT CONCLUDES THAT  
A PRIOR RESTRAINT MAY ISSUE  
UPON A MERE SHOWING OF "GOOD CAUSE"**

**A. The Court Holds that a Prior Restraint May Issue to  
Prevent Possible "Annoyance" or "Embarrassment".**

The opinion of the Washington Supreme Court assumes that the order in question is a prior restraint. (App. 37a). The court holds, however, that such a prior restraint may be entered merely upon a showing of "good cause," such as the potential for "annoyance" or "embarrassment" by other litigants. The court concludes, in effect, that entry of a judicial order forbidding expression is no different in substance from the issuance of a protective order merely changing the time or place of a scheduled deposition. The court's reasoning on this vital issue is directly inconsistent with the prior restraint test repeatedly adopted by this Court. To overcome the "heavy presumption" that attaches to prior restraints, the governmental justification must be more weighty than the possibility of Rhinehart experiencing "annoyance, embarrassment and even oppression" offered by the court below. (App. 38a).

The Washington Supreme Court concludes that the "heavy presumption" against prior restraints is rebutted and First Amendment requirements are satisfied simply because of "the interest of the judiciary in the integrity of its discovery processes." (App. 37a). By such reasoning, the general justifications underlying Wash. CR 26(c) are subtly but wrongly transmuted into a substitute for the specific factual proof required to justify this particular Protective Order. As this Court recognized in *Nebraska Press, supra*, where the proponents of the prior restraint sought to justify it on Sixth Amendment grounds, the existence of an important countervailing state interest does not end the constitutional inquiry into the propriety of a ban upon publication.

**B. The Court Misapplies the Prior Restraint Standards Repeatedly Articulated by this Court.**

A prior restraint constitutes "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 562. It is the "most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. Since *Near v. Minnesota*, 283 U.S. 697 (1931), this Court has recognized that there is a heavy presumption against the constitutionality of such a prior restraint. To be lawful, the prior restraint "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints . . ." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Even concerns as weighty as rights of privacy, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971); *Near v. Minnesota, supra*, the protections of the Sixth Amendment, *Nebraska Press Ass'n v. Stuart, supra*, or national security, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), cannot satisfy the heavy burden of proof required to justify a prior restraint.

In sharp contrast, the court below concludes that petitioners' freedom of expression may be abridged simply to avoid subjecting "a civil litigant to any exposure which he deems offensive, beyond that which serves the purpose of the rule." (App. 17a). This is not a proper application of the prior restraint test as enunciated by this Court. Nor is the "reasonable basis" standard, adopted by the trial court below (App. 2a, 3a, 6a), consistent with the "heavy burden of . . . justification" mandated by this Court. *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 558 (quoting *Organization For a Better Austin v. Keefe, supra*, 402 U.S. at 419). As Justice Utter's dissenting opinion correctly observes:

Had the majority actually applied the traditional doctrine of prior restraint, neither CR 26(c) nor the protective order in this case would have withstood the constitutional test. Even constitutional concerns for privacy do not rise to the level of overcoming the presumption of unconstitutionality attached to prior restraints. . . .

(App. 44a) (Utter, J., dissenting).

In misapplying prior restraint standards, the court asserts that First Amendment interests need not be accorded great weight, a position that ignores the genesis of this very lawsuit. According to the complaint, the defendant newspapers had published unflattering descriptions of Rhinehart and the Foundation, which informed the public that this "bizarre Seattle cult" was obtaining money from them through "consciously perpetrated frauds" and "by selling fraudulently-produced stones." As a result of the Protective Order, however, newspaper coverage has been curtailed and the public is denied pertinent factual data to determine the status of the lawsuit and whether or not the newspapers' previous characterization was accurate.<sup>7</sup>

That the Protective Order reaches only information learned in civil discovery, moreover, does not justify the court below in assuming that petitioners' First Amendment rights may be readily ignored or disregarded. "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). If the proscribed information is newsworthy and of significant interest to members of the public, the right to disseminate it cannot be judicially curtailed merely because it originates from judicial proceedings.<sup>8</sup>

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<sup>7</sup> In fact, the impact of the Protective Order is even broader, because, as a practical matter, it halts all such commentary and coverage by *The Seattle Times*. By its terms, the order broadly requires that defendants "make no use of" the information in question, "other than such use as is necessary . . . to prepare and try the case." (App. 6a). Thus, even if petitioners manage to obtain information about Rhinehart from third parties, they are prohibited from confirming the accuracy of their sources or determining the appropriate leads to follow because such basic journalistic practices would run afoul of the Protective Order insofar as they "make . . . use of" the prohibited information. *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (dangers of restraint on publication include indirect "suppression of speech . . . by inducing excessive caution in the speaker").

<sup>8</sup> The court below wrongly concludes that publication of such information, because it would involve the reporting of facts unaccompanied by "advocacy or abstract discussion" (App. 29a), is outside the protections of the First Amendment. The record is devoid of any findings that would support its predetermination that petitioners' use of information would not include

Furthermore, the court below acknowledges that the Protective Order is vague and overbroad but takes no corrective action. The decision assumes that the apparently infinite duration of the Protective Order and its application to information revealed in open court might be clarified on remand but offers no further guidance. (App. 38a-n.9). Through its opinion, the court also implies that the Protective Order precludes the newspapers from publishing *any* information learned in discovery. (App. 55a-56a) (Utter, J., dissenting). By contrast, this Court has specified that any restraint upon expression "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate." *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968). Moreover, though it did not purport to apply prior restraint standards, the court in *Halkin, supra*, 598 F.2d at 191 n.35, required that such an order "be couched in the narrowest terms," and in *San Juan Star, supra*, 662 F.2d at 116-17, the court, in upholding the protective order, emphasized that it was narrowly drawn and of limited scope and duration and that it did not in fact restrain publication.

The duration of the Protective Order is a significant defect. "A civil case may last for years, just in the discovery stage." *Chicago Council of Lawyers v. Bauer, supra*, 522 F.2d at 258. "Fragile First Amendment rights are often lost or prejudiced by delay." *Bernard v. Gulf Oil Co., supra*, 619 F.2d at 470. Because of today's crowded civil dockets, such orders could remain effective for several years. *Halkin* recognized this problem, noting that "civil litigation frequently lasts much longer than a criminal trial" and, thus, that any "civil restraining order will . . . generally restrict expression for a longer period of time." *Halkin, supra*, 598 F.2d at 193 n.40. See also *Hirschkop v. Snead, supra*, 594 F.2d at 373. Compare *Nebraska Press Ass'n v. Stuart, supra* (two and one-half month injunction in criminal case is unconstitutional). Indeed, the circumstances

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(footnote continued)

editorial comment. Moreover, even where information is purely factual, this Court has held that its publication is constitutionally protected. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977). These decisions reflect an implicit acknowledgment that freedom of expression cannot survive on advocacy alone.



of this very case, in which the Protective Order has remained in place since June 26, 1981, offer a vivid illustration.<sup>9</sup>

### C. The Court Fails to Formulate a Proper First Amendment Test.

The prior restraint test announced by the Washington Supreme Court is, as the dissenting opinion recognized, no test at all. The court refuses to engage in any serious attempt to weigh petitioners' First Amendment interests. Indeed, even as it characterizes the order in question as a prior restraint, the court criticizes any judicial attempt to articulate a test for evaluating the merits of the restraint and balancing it against First Amendment goals. In so doing, the court has issued a ruling on a substantial federal question that is directly at variance with the prior rulings of this Court. See Rule 17.1(c), Sup.Ct.R.

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<sup>9</sup> The damage to First Amendment values in these circumstances is not limited to the "direct and immediate" impact, *Bernard v. Gulf Oil Co.*, *supra*, 619 F.2d at 469, of outlawing constitutionally protected expression. In *Reliance Insurance Co. v. Barron's*, *supra*, 428 F. Supp. at 205, the court rejected a similar attempt to obtain a protective order in a defamation action and described the potential "chilling effect" of enforcing any such order against editors and reporters in order to determine "whether defendants came by [published information] in the ordinary fashion, or through violation of our pre-trial order." *Accord*, *New York Press Publishing Co., Inc. v. McGraw-Hill Publications Co.*, 64 A.D.2d 962, 409 N.Y.S. 2d 39, 4 Med. L. Rptr. 1819 (1st Dept. 1978). In fact, the damage is aggravated in cases such as these, where the restraint is obtained by a defamation plaintiff as part of a lawsuit which seeks to punish the defendant for prior publications and which, itself, has an inherent (and presumably intended) effect of chilling the future exercise of First Amendment rights.

## CONCLUSION

The speculative analysis put forward by the court below would justify entry of a ban upon publication in every instance, because it ignores this Court's rulings in *Nebraska Press* and *Gulf Oil* and does not require any specific showing of harm. Moreover, the opinion below disregards the First Amendment interests affected by the Protective Order, which, in *Halkin*, *San Juan Star*, and other cases, were held to attach even to information learned in the course of civil litigation. In holding that a prior restraint may issue upon the slightest showing of "good cause" where the proponent of the restraint simply offers "reasonable grounds" for imposing a restraint upon freedoms of speech and publication, the decision radically departs from the prior holdings of this Court. In conclusion, the decision below utterly fails to address the significant First Amendment problems inherent in any judicial order that forbids publication or to articulate a proper test for determining the propriety of such an order.

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Washington Supreme Court.

DATED April 22, 1983.

Respectfully submitted,

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## APPENDIX



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**APPENDIX A**

**IN THE**

**SUPERIOR COURT OF THE STATE OF WASHINGTON**

**FOR KING COUNTY**

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**No. 80-2-02460-4**

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**KEITH MILTON RHINEHART, *et al.*,**

*Plaintiffs,*

**vs.**

**THE SEATTLE TIMES, *et al.*,**

*Defendants.*

**OPINION GRANTING PLAINTIFFS' MOTION FOR  
PROTECTIVE ORDER**

The defendants in this case are engaged in extensive discovery which requires that the plaintiffs disclose a great deal of information which would normally be kept confidential. The Court has ordered disclosure of statements of assets and liabilities, other financial and investment information, names and addresses of persons involved in the Aquarian Foundation and other information which the defendants normally would not receive.

The Court has ordered disclosure of this information pursuant to the provisions of Civil Rule 26(b)(1) which provides as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including

the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Those drafting Rule 26 recognized that along with liberal discovery there was a need for protective orders in order to protect a party from abuse or embarrassment and in order to prevent unbridled dissemination of information which a party gained only through the discovery process.

One of the defendants in this case is The Seattle Times, a daily newspaper with a heavy readership in western Washington and which is distributed throughout the entire state.

The Seattle Times asserts that it has a right under the First Amendment of the United States Constitution to print in its newspaper any information it gains through the discovery process in this case. In effect, The Seattle Times argues that Rule 26(c) providing for Protective Orders simply does not apply to a daily newspaper because of its First Amendment rights.

As counsel for the plaintiffs has very ably pointed out, all persons and all legal entities are protected in their freedom of expression by the First Amendment. It applies to everyone, not just newspapers, magazines, radio stations and television stations. Thus there would seem to be no basis for treating a litigant who happens to be a newspaper publisher any different from any other litigant insofar as a litigant's rights under the First Amendment are concerned.

Protective Orders are entered routinely in cases where the party seeking the Protective Order has a reasonable basis for its request that the information gained through discovery be used by the discovering party for no purpose other than the legitimate purposes of the case in which discovery was granted. This

means that the information is not disseminated any more than is absolutely necessary for the discovering party to prepare for trial and to try his case.

The plaintiffs here have reasonable grounds for the issuance of such an order in connection with information developed regarding the financial affairs of the various plaintiffs, names and addresses of Aquarian Foundation members and those contributing funds to the Foundation and names and addresses of those who have been contributors, clients or made donations to the Aquarain Foundation or the Plaintiff Rinehart.

Counsel for the defendants has pointed out that a Protective Order cannot apply to information gained by a litigant about his opponent which is not gained through the use of one or more of the discovery vehicles provided by the Civil Rules. This contention is correct. The Protective Order in this case has no application except to information gained by the defendants through the use of the discovery processes.

The intent and purpose of the Protective Order will be that the discovering party make no use or dissemination of the information gained through discovery other than such use as is necessary in order for the discovering party to prepare and try the case. It follows that information gained through the discovery process will not be published by The Seattle Times or made available to any news media for publication or dissemination.

Defendants argue that a Protective Order which has the effect of preventing publication of information gained through discovery in its daily newspaper violates freedom of the press rights guaranteed by the First Amendment. Defendants cite cases in support of their position. The case of *In Re Halkin*, 598 F.2d 176 is a case in point because it involves the use that can be made of information learned through the discovery process. *Halkin* emphasizes the importance of First Amendment rights and holds that if a Protective Order restricting First Amendment rights is to be entered such an order should be narrow in scope, necessary because of the threatened harm and the lack of any reasonable alternative. *In Re Halkin* holds that the First Amendment applies to discovery materials. In *Halkin*

the defendants did not request a Protective Order prior to discovery. The request was made only after the plaintiff had gained the discovery materials and then announced that it intended to release the information to the press. The *Halkin* opinion does not deal directly with the question of the relationship between a Protective Order and First Amendment rights.

Provision for a Protective Order was adopted in the first place so that the Court, in the interest of full disclosure and litigation, could order production of information normally kept confidential and then protect against abuse by requiring that the information receive only such dissemination as was necessary in the handling and preparation of the particular case involved.

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Counsel for plaintiffs can present an order consistent with this opinion.

DATED AT SEATTLE, WASHINGTON this 10th day of June, 1981.

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/s/ JACK P. SCHOLFIELD

Jack P. Scholfield, Judge

## APPENDIX B

## SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

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No. 80-2-02460-4

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KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES, a Delaware Corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, Inc.; ERIK LACITIS AND JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY AND KAREN MCCOY,

*Defendants.*

## PROTECTIVE ORDER

THIS MATTER having come on upon the motion of the plaintiffs for a protective order, and the court having reviewed the affidavits of Marilou McIntyre, Linda Dunn, Robert Plante, Gillene Avalos, and Catherine Harold, and the court having considered the positions advanced by plaintiffs ~~with respect to the rights of plaintiffs and members of the Aquarian Foundation to freedom of association and religion and to rights of privacy,~~ and the court having considered that the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts, and the court



being fully advised, NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have reasonable grounds for the issuance of a protective order.
2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.
3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.
4. Defendants' motion for a stay is denied.

June 26, 1981.

/s/ JACK P. SCHOLFIELD

Jack P. Scholfield, Judge  
King County Superior Court

Presented by:

EDWARDS AND BARBIERI

By /s/ MALCOLM L. EDWARDS

Malcolm L. Edwards  
Attorneys for Plaintiffs

## APPENDIX C

## THE SUPREME COURT OF WASHINGTON

98 Wn.2d 226, 654 P.2d 673

[Nos. 47938-1, 48155-5. En Banc. December 2, 1982.]

KEITH MILTON RHINEHART, *et al*, Respondents, v. THE SEATTLE TIMES COMPANY, *et al*, Petitioners.

[1] Discovery—Constitutional Law—Freedom of Press Information Obtained Through Discovery—Protective Order Validity—Factors. CR 26(c), which permits a trial court to forbid publication of information obtained through discovery upon a showing of “good cause”, is constitutional. The First Amendment does not give the news media more right to use information obtained during discovery than any other litigant. To determine if “good cause” exists for a protective order, the court must balance the interests served by protecting the confidentiality of the information (e.g., ensuring the full and truthful disclosure of relevant facts and protecting individuals’ legitimate privacy interests in avoiding unwanted publicity) against the interests served by allowing publication of the information (e.g., informing the public of matters of legitimate public concern) under the circumstances. The trial court’s decision regarding the issuance of a protective order is reviewed for an abuse of discretion.

[2] Discovery—Scope—Effect on Constitutional Rights—Protective Order. The scope of discovery is a matter within the trial court’s discretion. Any adverse impact which disclosure has on individual privacy and association rights may be minimized by issuance of a protective order under CR 26(c). DOLLIVER, J., BRACHTENBACH, C. J., and DIMMICK, J., concur by separate opinion; UTTER and PEARSON, J. J., dissent by separate opinion.

Nature of Action: In an action against two newspapers seeking damages for defamation and invasion of privacy, the plaintiffs refused to disclose certain information requested during discovery.

Superior Court: The Superior Court for King County, No. 80-2-02460-4, Jack P. Scholfield, J., on June 26, 1981, entered an order compelling discovery and a protective order prohibiting the newspapers from publishing the information acquired through discovery.

Supreme Court: Holding that under the circumstances the protective order did not deny the newspapers freedom of the press or freedom of speech and was adequate to safeguard the plaintiffs' privacy and associational interests, the court *affirms* the orders.

*Davis, Wright, Todd, Riese & Jones*, by *Evan L. Schwab* and *Bruce E. H. Johnson*, for petitioners.

*Edwards & Barbieri*, by *Malcolm L. Edwards* and *Robert G. Sieh*, for respondents.

*Gordon G. Conger, Robert B. Mitchell, and Susan D. Jones* on behalf of KIRO, Inc., amici curiae for petitioners.

[As amended by order of the Supreme Court December 13, 1982.]

ROSELLINI, J.—The Seattle Times published stories concerning the Aquarian Foundation and its leader, Rhinehart, who founded the organization in the 1950's. Articles about the foundation, a "spiritualist church", also appeared in the Walla Walla Union-Bulletin, describing some bizarre performances which were presented at a "religious presentation" staged for inmates at the state penitentiary at Walla Walla.

Rhinehart brought this action on behalf of himself and the foundation, seeking damages for defamation and invasion of privacy. He was joined by four members who participated in the Walla Walla presentation.

The defendants denied many of the allegations and asserted affirmative defenses including claims to privilege. They undertook discovery with respect to the plaintiffs' financial affairs, membership and donors. This information was relevant upon the issues of truth and damages. It appears that the attorney for the defendants assured counsel for the plaintiffs that financial materials disclosed to him would be kept confidential. The defendants were provided with income tax returns of Rhinehart and some financial information relating to the other plaintiffs. The plaintiffs refused, however, to disclose other desired information, such as the present address of

Rhinehart, who allegedly had fled the state because of threats to his life resulting from the publicity given the foundation by the defendants.

The defendants sought and were granted an order compelling discovery, and the plaintiffs obtained a protective order limiting the use which could be made of information derived through the discovery process. The order provided:

3. The defendants and each of them shall make no use of and shall not disseminate the information . . . which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.

Clerk's Papers, at 26.

The plaintiffs objected to the order compelling discovery on the grounds that it invaded their right to privacy and freedoms of religion and association. The defendants attacked the protective order on the ground that it denied them freedom of the press and of speech, guaranteed by the first amendment to the United States Constitution and by Const. art. 1, § 5.

The trial court filed a memorandum opinion explaining the protective order. In that opinion it found that the defendants were entitled to make discovery under Superior Court Civil Rule 26(b)(1) and that the plaintiffs had reasonable grounds for the issuance of a protective order in connection with information covered by the order. It also observed that if protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court." The court said:

If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a

result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Clerk's Papers, at 63.

Both of the court's orders are before us on this discretionary review.

The gist of the defendants' theory in attacking the protective order is that CR 26(c) is unconstitutional insofar as it permits the court to limit the use which the press or its members can make of information which they have received through discovery, upon a mere showing of "good cause".

[1] Under the federal constitution, persons engaged in the business or profession of publishing or otherwise communicating with the public are entitled to no greater protection than citizens who are not so engaged. Their right of access to information within the control of the government is the same. *Houchins v. KQED, Inc.*, 438 U.S. 1, 57 L. Ed. 2d 553, 98 S. Ct. 2588 (1978) (access to jails); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) (access to tapes not placed in evidence at trial); *Pell v. Procunier*, 417 U.S. 817, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974) (access to prisons and inmates). See *Estes v. Texas*, 381 U.S. 532, 589, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965) (Harlan J., concurring).

Nor is there any basis for holding that a publisher, when he is a party to litigation, enjoys a greater immunity from protective orders than do other litigants, as the defendants would have us hold. Neither the first and fourteenth amendments to the United States Constitution nor article 1, section 5 of our state constitution makes any distinction among citizens in conferring their protections.

Therefore, whatever power the courts have to enter protective orders to forestall the giving of unwanted publicity to the fruits of discovery, that power extends to all litigants.



The defendants maintain that a protective order which forbids publication of matters learned through discovery constitutes a "prior restraint on expression" which, while not unconstitutional per se, bears a "heavy presumption" against its validity. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975). The Supreme Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) indicated that prior restraints "are the most serious and the least tolerable infringement on First Amendment rights." At common law the term "prior restraint" referred to a system of unreviewable administrative censorship or licensing. But the meaning has been extended through a long line of cases beginning with *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931) to include judicial orders having an impact similar to administrative censorship.

The order here does restrain the publication of certain matters, although the restraint as to those items which are later admitted into evidence will terminate at that time. The restraint is not inspired by any governmental objection to the content of the publication, and the subject matter involves no element of advocacy or dissemination of ideas. We would be inclined to the view that these facts should lighten the burden of justifying the restraint. However, the United States Supreme Court has found prior restraints where the only matter involved was evidentiary materials derived from judicial proceedings. See *Nebraska Press Ass'n v. Stuart*, *supra*; *Smith v. Daily Mail Pub'g Co.*, 443 U.S. 97, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979).

We do not believe that the prior restraint doctrine applies to protective orders. We do not reach this issue, however, because even under the prior restraint doctrine protective orders can be justified. Under this doctrine the burden of justifying the restraint rests primarily upon this court, inasmuch as it results from the implementation of CR 26(c), which we have adopted, using the federal rules (Fed. R. Civ. P. 26(c)) as its basis.

We must look then to the reasons for the rule and the nature of the interests involved to see if it is justified.

As the Supreme Court directed in *Nebraska Press Ass'n*, we must also examine whether the order here furthers those purposes and interests, whether other measures would be likely to mitigate the effects of the unwanted publicity involved here; and how effectively the protective order would operate to prevent the threatened harm.

With respect to the possibility of mitigation by other measures, the defendants suggest nothing other than denial of discovery altogether, which is admittedly within the power of the court. Since this would have the effect of closing access to the material sought to be published and denying the defendants the benefits of discovery, it is not a satisfactory alternative. As for the effectiveness of the protective order, it must be assumed that the defendants will abide by the court's order and, as will appear later, the evil against which the rule is directed is a litigant's disclosure of information furnished him in the discovery process. Our main inquiry, therefore, will concern the interests which justify a rule which authorizes protective orders in circumstances such as these. Such orders are meant to protect the health and integrity of the discovery process, as much as to protect the parties who participate in it.

CR 26 pertains to depositions and discovery. At common law opportunities for discovery were limited, as a result of which it was often said that trials were conducted "by ambush". Propounding interrogatories and obtaining documents were not authorized. *State ex rel. Bronson v. Superior Court*, 194 Wash. 339, 77 P.2d 997 (1938); *Puget Sound Nav. Co. v. Associated Oil Co.*, 56 F.2d 605 (W.D. Wash. 1932). Some discovery was allowed in equity, but it did not come into its full flower until the promulgation of the federal rules and the adoption of these rules by the states. It is not disputed that without CR 26 the petitioners would have no right of access to the information which they claim a constitutional right to publish.

CR 26(b)(1) allows a broad scope of discovery, the only restrictions being that the matter must be relevant and not privileged. CR 26(c) provides that upon "good cause shown"

the court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense". There is no dispute that this authorization is broad enough to permit the court to restrain use of discovery information for unauthorized purposes. The purpose of the rule is to enable the parties to prepare their cases for trial.

Chief Justice Warren, in a foreword to W. Glaser, *Pretrial Discovery and the Adversary System* (1968) said:

The pretrial discovery rules have attempted to remove secrecy and surprise from the trial, thus presenting the fact-finder with a less dramatic, but more accurate, presentation of information. Proponents assert that the rules have proved successful in this regard. Yet there has been widespread debate and disagreement about whether the discovery rules, on balance, have improved the adversary system. Critics have doubted whether the benefits have been achieved, and have charged that discovery is unduly expensive and promotes delay and harassment.

It is toward the amelioration of these problems, among others, that CR 26(c), providing for protective orders, was directed. Under this rule the trial court exercises a broad discretion to manage the discovery process in a fashion that will implement that goal of full disclosure of relevant information and at the same time afford the participants protection against harmful side effects. 4 J. Moore, *Federal Practice* ¶ 26.67, at 26-487 (2d ed. 1982). Unfavorable publicity is one of such "harmful side effects". 4 J. Moore, *supra*, ¶ 26.73; see also ¶ 26.74.

In *International Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963), the Second Circuit Court of Appeals, speaking through Judge Friendly, said:

[W]e entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publici-

zing, in advance of trial, of information obtained by one party from another by use of the court's processes.<sup>1</sup>

In *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981) (a case in which the parties had consented to a protective order), the Court of Appeals said:

An important purpose of a pre-trial protective order is to preserve the confidentiality of materials which are revealed in discovery but not made public by trial.

As for matters which were admitted in evidence at the trial, however, the court held that the right to publish these, once they had become a matter of public record, was protected by the First Amendment, although the right could be waived. See also *Nichols v. Philadelphia Tribune Co.*, 22 F.R.D. 89 (E.D. Pa. 1958).

*Martindell v. ITT*, 594 F.2d 291 (2d Cir. 1979) was a civil suit in which the federal government attempted to gain access to depositions of witnesses for criminal investigative purposes. Holding that the lower court correctly withheld these depositions in order to protect the witnesses' Fifth Amendment rights and to enforce a stipulation that the information should remain confidential, the Court of Appeals said:

These [the government's] arguments ignore a more significant counterbalancing factor—the vital function of a protective order issued under Rule 26(c), F.R.Civ.P., which is to “secure the just, speedy, and inexpensive determination” of civil disputes, Rule 1, F.R.Civ.P., by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice. Unless a valid

<sup>1</sup> A more restrictive view was taken by two members of a 3-judge panel of the District of Columbia Court of Appeals in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), strongly relied upon by the defendants here. That case and others which have adopted its holding will be discussed later.

Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

*Martindell*, at 295-96.

That same court said in *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) that the grant and nature of protection is singularly within the discretion of the trial court and may be reversed only on a clear showing of abuse of discretion.

In order to prevent the revelation of trade secrets, a court may properly exact from the party seeking this information assurances under oath that none of the information obtained will be divulged except in the course of judicial proceedings. *Paul v. Sinnott*, 217 F. Supp. 84 (W.D. Pa. 1963).<sup>2</sup>

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<sup>2</sup> In some areas of litigation, public policy favors public disclosure of information derived in the discovery process. Congress has expressly provided that in the taking of depositions for use in "any suit in equity brought by the United States under sections 1-7 of this title, . . . the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." 15 U.S.C. § 30 (1958). The Ninth Circuit has found this policy applicable to other forms of discovery and in private antitrust suits as well, because "[p]rivate treble-damage actions are an important component of the public interest in 'vigilant enforcement of the antitrust laws'" (citing *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329, 99 L. Ed. 1122, 75 S. Ct. 865 (1955)). *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964).

However, it was held in *D'Ippolito v. American Oil Co.* 272 F. Supp. 310 (S.D.N.Y. 1967) that this statute does not apply to actions commenced by private litigants. And in *United States v. IBM*, 87 F.R.D. 411 (S.D.N.Y. 1980), it was recognized that even where the government brings the action, the public may be excluded under appropriate circumstances and protective orders may be entered.



Thus, the rule has generally been given effect according to the import of its words. The issuance of protective orders is within the discretion of the trial court, to be granted where, in its judgment, good cause exists, having in mind the purpose of the discovery rule to encourage full disclosure of all relevant facts so as to facilitate the administration of justice, acquaint the examiner with the testimony that will be given at trial, develop the truth, shorten and simplify the trial, eliminate elements of surprise, and permit the parties to prepare for trial.

Nowhere in the history of the rules or in the commentaries which we have read upon them can we find any indication that the purposes included that of disseminating to the general public the information derived from discovery, or any suggestion that such dissemination would serve the ends sought to be achieved by the rule. Chief Justice Burger, concurring in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), made this significant observation:

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories *were other than wholly private to the litigants*. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. . . . In the entire pretrial period, there is no certainty that a trial will take place.

(Italics ours.) *Gannett*, at 396-97.

Nevertheless, within the last few years, there has appeared a line of cases which hold that a protective order forbidding publication of discovery material cannot be entered if the material is of sufficient newsworthiness, unless the court finds that (1) the harm posed by dissemination is substantial and serious, (2) the restraining order is narrowly drawn and precise, and (3) there is no alternative means of avoiding the harm which intrudes less directly on expression.

*In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) is the leading case espousing this doctrine. The defendant in *Halkin* was the United States government, sued by the plaintiffs for invasion of their constitutional rights through unlawful surveillance, occasioned by their opposition to the war in Vietnam. There was no question but that the matters revealed were of public importance, as well as public interest. Here there is no indication that the Aquarian Foundation's activities enjoy a comparable distinction. Nor is the government a party. These facts are sufficient to distinguish *Halkin*. Moreover, we are not convinced that the *Halkin* approach properly serves the administration of justice. As the 2-judge majority did in *Halkin*, we look to the United States Supreme Court for guidance. We are led, however, to a different conclusion.

Why are protective orders needed? There has never been any question but that the individual's interest in commercially valuable information, such as "trade secrets", deserves protection. But the language of CR 26(c) makes it clear that interests other than financial warrant protection under the rule. Protective orders may be entered to prevent "annoyance, embarrassment, oppression, or undue burden or expense".

Implicit in this language is a recognition that by requiring a party to submit to the searching inquiries of discovery, the courts have required him to give information about himself which he would otherwise have no obligation to disclose. A realm of privacy which courts had previously left undisturbed was now opened. True, as to all information derived through these proceedings and admitted at trial, a party's interest in privacy must be sacrificed to the needs of adjudication. But as to other information which he is forced to give under the liberal rules of discovery, the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case. It was the needs of litigation and only those needs for which the courts adopted this rule and demanded of the litigant a duty which would not otherwise be his. For this reason, it is proper that the courts be slow to subject a civil litigant to any exposure which he deems offensive, beyond that which serves the purpose of the rule.

Rights of privacy are established in tort law. *See* Restatement (Second) of Torts §§ 652-652I (1977); *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981). A tort action should not and does not constitute the sole protection which government affords to the privacy interest of individuals. A threatened invasion of those interests may not have all of the characteristics necessary to warrant recovery of damages under existent tort principles and yet be properly a subject of governmental sanction. Numerous statutes of this state provide examples of such intervention.

These include RCW 43.07.100 (information regarding personal affairs furnished to the Bureau of Statistics); RCW 26.26.050 (records of artificial insemination); RCW 71.05.390 (information regarding the mentally ill); RCW 7.68.140 (information regarding records of crime victims). Other statutes protecting confidentiality include RCW 10.29.030(3), RCW 15.65.510, RCW 18.20.120, RCW 18.46.090, RCW 18.72.265, RCW 19.16.245, RCW 24.03.435, RCW 24.06.480, RCW 42.17.310 (the public disclosure initiative lists 11 categories of exempt records, including those containing personal information regarding students, patients, clients, prisoners, probationers, parolees, and information regarding employees, appointees or elected officials, "to the extent that disclosure would violate their right to privacy"), RCW 43.21F.060, RCW 43.22.290, RCW 43.43.856, RCW 43.105.041, RCW 48.13.220, RCW 49.17.200, and RCW 78.52.260.

Federal statutes forbid disclosure except for limited purposes of census information (Census Act, 13 U.S.C. §§ 8, 9, 214 (1954)), data concerning personal lives and business affairs given for purposes of tax collection (Internal Revenue Code, 26 U.S.C. § 6103 (1964)), and disclosure by a federal officer of a wide range of confidential information concerning the operation of businesses (18 U.S.C. § 1905 (1948)).<sup>3</sup>

<sup>3</sup> *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 (1964). Professor Bloustein, noting the "increasing accumulation of information about each of us which finds its way

(footnote continues)

The "prior restraint" involved in a protective order issued in discovery proceedings is no different in substance from that which is imposed by these statutes. Each protects the confidentiality of information extracted through governmental processes. It is obviously the legislative purpose in enacting these protective statutes, as it was of the Congress and the courts in adopting the discovery rules, to both protect the individual's right of privacy and secure his willing and honest response to the questions asked. In each instance, it is deemed necessary to give the protection in order to achieve the government's objective, whether that be the facilitation of the truth seeking objective in litigation, the imposing of an income tax, care and treatment of the mentally ill, the promulgation of regulations affecting an industry, or other legitimate governmental goal.

We think it safe to say that because of their encroachment upon First Amendment rights of speech and press, if provisions such as these cannot be sustained, the result surely will be a serious undermining of the morale of the people as well as the integrity of government. Provisions such as these, like CR 26(c), express strong governmental policy, designed to protect

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(footnote continued)

into government records and files", said:

Most of us have agreed . . . that the social benefits to be gained in these instances require the information to be given and that the ends to be achieved are worth the price of diminished privacy.

But this tacit agreement is founded upon an assumption that information given for one purpose will not be used for another. We are prepared to tell the tax collector and the census taker what they need to know, but we are not prepared to have them make a public disclosure of what they have learned. The intrusion is tolerable only if public disclosure of the fruits of the intrusion is forbidden. This explains why many of the statutes which require us to tell something about ourselves to a government agency contain an express provision against disclosure of such information. It also explains why there are general provisions prohibiting disclosure of information of a personal nature gained in an official capacity.

(Footnotes omitted.) Bloustein, *supra* at 999.

valuable rights of private individuals as well as to further legitimate interests of the state. The court's endeavor should be to uphold such measures if possible, if it can be done without unduly invading some other protected right. A persuasive argument can be made that when persons are required to give information which they would otherwise be entitled to keep to themselves, in order to secure a government benefit or perform an obligation to that government, those receiving that information waive the right to use it for any purpose except those which are authorized by the agency of government which exacted the information.<sup>4</sup> However, because the United States Supreme Court has been reluctant to find waiver in First Amendment cases, we do not pursue that theory but confine ourselves to the question whether the "heavy burden" of justifying the restraint has been sustained in the circumstances of this case.

It is not alone in the area of tort law or statutory enactment that rights of privacy have been acknowledged. The United States Supreme Court both in majority and minority opinions has exhibited increasing awareness and appreciation of these important adjuncts to freedom.

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<sup>4</sup> The Supreme Court has said that waivers of First Amendment rights are to be inferred only in "clear and compelling" circumstances. *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 145, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). Also in *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), the Court found that denial of tenure to a teacher had been caused by his advocacy of positions contrary to those of his employers and held that a benefit such as employment could not be conditioned on a waiver of constitutional rights.

We find it difficult to conceive of circumstances more "clear and compelling" than those involved here. Parties seeking to utilize the processes of discovery necessarily acquaint themselves with the rules which attend that process. They know the purposes for which discovery is intended, and that protective orders can be entered in the discretion of the court. Attorneys are surely aware that it is improper to exploit the fruits of discovery by using them for other than authorized purposes. It is true that no penalty can attach for such use if a protective order is not obtained; but it is understood in the majority of cases that confidentiality will be respected, thus removing the necessity of seeking such an order to protect against unwanted publicity.

In the case of governmental employees and officials, it is also presumably made clear to them upon assuming their duties that information obtained in the course of their duties from private persons is to be kept confidential.



Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564, 66 A.L.R. 376 (1928), said:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

In *Time, Inc. v. Hill*, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967), Justice Fortas (joined by the Chief Justice and Justice Clark), dissenting, said:

There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. . . . It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Mr. Justice Brandeis said in his famous dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

. . . As stated in the concurring opinion of Mr. Justice Goldberg, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN joined: "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" [*Griswold v. Connecticut*, 381 U.S. 479, 494 (1965)].

(Footnotes omitted.) *Time, Inc.*, at 412-14.

*Time, Inc.* was a case in which the plaintiffs sought damages for invasion of their privacy through publication of a story falsely declaring that they had been involved in an encounter with convicts similar to the one then being portrayed in a stage play in New York. The Court held that *Times, Inc.*, could be held liable only if the story was printed recklessly or with knowledge of its falsity.

Since the decisions in that case and *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971) (extending the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964) to matters of general or "public interest" as well as public officials and public figures), the high Court has begun to take a more sympathetic view of the rights of persons who are the victims of publicity. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977) (a television station owner may not appropriate an individual's entertainment act); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) (an attorney, even though he has gained a reputation in the community, is a private individual and does not have to meet the *New York Times* standards of proof in pursuing a libel action). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), the Court took note of the fact that there is, in this century, "a strong tide running in favor of the so-called right of privacy" and said that powerful arguments can be made that there is a zone of privacy surrounding every individual, a zone within which the state may protect him from intrusion by the press, with all its attendant publicity. There, a damage action was brought, relying upon a Georgia statute which made it a misdemeanor to broadcast a rape victim's name. The Court upheld the broadcasting company's right to announce the name in that case, because it appeared in the records of the court, which were open to the public. It said that the state may not impose sanctions on the publication of truthful information contained in official court records open to public inspection. However, the

Court did not suggest that all judicial proceedings are necessarily public. On the contrary, it said:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weight the interests in privacy with the interests of the public to know and of the press to publish.

(Footnote omitted.) *Cox Broadcasting Corp.*, at 496.

In a footnote, the Court said that it was not implying anything about constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.

These two statements taken together strongly suggest that the Court was aware of the overriding necessity for the protection of privacy interests in certain governmental contexts—such as those involved in discovery proceedings and the various situations covered by the statutes we have cited earlier.

The Supreme Court has recognized privacy claims in *Carey v. Population Servs. Int'l*, 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); and *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). And in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958), the Court gave strength to the individual's freedom of association, which is one of the attributes of the interest in privacy. There an attempt on the part of the State to require the NAACP to disclose its membership lists was rebuffed. The Court said: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association". *NAACP*, at 462.

Thus we have seen that the courts, in promulgating the rules of discovery, were aware that by allowing liberal dis-

covery, with inquiries into matters which would not necessarily be introduced or admissible at trial, they were permitting invasions of a litigant's private domain and were rightly concerned that he should be protected against abuse of the discovery process.

Protection against use of materials for publicity purposes has most frequently been achieved by limiting the parties in attendance at a deposition and ordering the deposition sealed until further order of the court. 4 J. Moore, *Federal Practice* ¶ 26.74 (2d ed. 1982).

Cases involving a claim of constitutional right to publicize the results of discovery appear to be recent phenomena.

Among those courts which have been called upon to consider the proposition, we have been surprised to find some which have summarily held that the right to publish is paramount, without giving any attention to the needs of judicial administration, or the interests of litigants. These include *Georgia Gazette Pub'g Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981), reversing a thoughtful opinion of the superior court judge. That judge did not reject *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), but found all of its requirements satisfied, essentially upon the basic principle that giving publicity to discovery materials does not serve the fair administration of justice. The judge pointed out that a protective order would help ensure a fair trial in the civil case and in any possible criminal proceedings which might be brought against the plaintiff.<sup>5</sup>

The Georgia Superior Court also took notice of the plaintiff's privacy interests and the exploitation which was within the power of the defendant as a publisher of newspapers.

Unfortunately, the Supreme Court of Georgia paid no heed to these considerations, but held without discussion that the provision of the state constitution guaranteeing freedom of the press was decisive of the issue. Inasmuch as the court

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<sup>5</sup> This was an action for invasion of privacy based on a story about the plaintiff, a dentist, as a prime suspect in the investigation of a crime.

ignored the objectives and needs of judicial administration, as served by the discovery rules or the interests of litigants, we do not find that opinion persuasive.

In contrast is the approach of Mr. Justice Rehnquist, concurring in *Smith v. Daily Mail Pub'g Co.*, 443 U.S. 97, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979). He cited *American Communications Ass'n v. Douds*, 339 U.S. 382, 394, 94 L. Ed. 925, 70 S. Ct. 674 (1950), where the Court had said: "Freedom of speech . . . does not comprehend the right to speak on any subject at any time", and also quoted from *Branzburg v. Hayes*, 408 U.S. 665, 683, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), "the press is not free to publish with impunity everything and anything it desires to publish." Rehnquist said that conflicting interests must be weighed. He would make it clear that the protection of a juvenile's reputation is a state interest of the highest order, but agreed with the result reached in *Smith* because the statute did not achieve its objective.

In *New York Press v. McGraw-Hill*, 4 Media L. Rep. 1819 (N.Y. App. Div. 1978), the appellate division of the New York Supreme Court, in a business defamation action against a publisher, held that the absence of a showing that the defendant's use of material and information obtained during discovery would seriously harm the plaintiff, or to show that such material was confidential, justified the New York Supreme Court (trial court) in refusing to grant a requested protective order. That court was of the opinion that the news media, even when a party to the action, had a right to gather news at a discovery proceeding and publish it, and that the right should not be interfered with except under the most extreme circumstances. We do not share that view.

The Florida Circuit Court for the Seventeenth Judicial Circuit, Broward County, denied a motion to exclude the press and public from discovery proceedings in *Johnson v. Broward Cy.*, 7 Media L. Rep. 2125 (Fla. Cir. Ct. 1981). It appears from the opinion that under Florida law depositions are generally open to the public. That is not the case in this state.

*Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977) was a damage action brought by an insurance company against a well known financial magazine and one of its



contributors, a professor of accountancy. Before discovery began, the plaintiff asked for what the district judge termed "the customary pre-trial stipulation and order of confidentiality, limiting pre-trial use of such material to matters pertaining to this action." *Barron's*, at 202. The plaintiff specifically asked that no other uses be made of nonpublic information obtained pursuant to the discovery proceedings. The defendants declined to so stipulate and the court refused to enter a protective order, finding first that the plaintiff had failed to show that it "[would] indeed be harmed by disclosure." *Barron's*, at 204, quoting from *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 409 (N.D.N.Y. 1973). But the court said that it would be inclined to issue the order if the defendants were not members of the press. It held that to restrain them from publishing information gained through discovery proceedings would constitute a "prior restraint", and that to justify such an order the plaintiff was required to demonstrate that the material to be restrained was, indeed, confidential and that its publication would cause plaintiff to suffer serious and irreparable injury.

For this proposition, the court cited only *New York Times Co. v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971), and that not as direct authority but as a comparable case. However, *New York Times* had nothing to do with the discovery process. It was an injunction suit brought by the United States against a newspaper to restrain publication of materials concerning government policy, which were, of course, of great interest to the public.

The district court in *Barron's* assumed that members of the media, when in court, have rights superior to those of other parties. This, as we have observed, is not a valid assumption.

In *Koster v. Chase Manhattan Bank*, 8 Media L. Rep. 1155 (S.D.N.Y. 1982), the United States District Court for the Southern District of New York wrote a scholarly opinion reviewing the history and nature of the discovery process in the courts, their holdings with respect to the limited First Amendment interest that litigants have in disseminating information learned through discovery, and the conflicting views which courts have expressed as to the standards to be used in

evaluating protective orders restricting dissemination. The court took cognizance of the fact that the nature of discovery makes it unfair to allow the recipient of discovery materials an unlimited right to disseminate those materials. It indicated approval of the views of Wilkey, J., dissenting in *In re Halkin, supra*, who said that a litigant accepts the materials produced through discovery subject to the possibility that the court may restrict their use.

The court in *Koster* also noted the developing controversy regarding the standard which should be used to test the validity of a protective order. But having made all of these observations it avoided adoption of any standard by holding that, under the most lenient, the defendants had not shown good cause to issue a protective order. This opinion illustrates the difficulties which the trial courts create for themselves when they attempt to enunciate restrictive criteria for the exercise of their discretion.

At least two federal courts have made that attempt, the District of Columbia Court of Appeals in *In re Halkin, supra*, and the First Circuit Court of Appeals in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981).

The 2-judge majority in *Halkin*, while not willing to go so far as to declare a protective order to be a "prior restraint" on freedom of expression, as that term is generally understood, found that it did involve "First Amendment interests". *Halkin*, at 191. In that case the subject matter of the discovery process constituted material of considerable legitimate interest to the public.

The protective order concerned certain documents relating to government surveillance of opponents of the war in Vietnam and other political activities. The documents had been purged of all sensitive matters before being handed over to the plaintiffs pursuant to discovery requests. No protective orders were sought until after the documents were in the hands of the plaintiffs and they proposed to release some of the documents to the press. The government claimed that public disclosure of these documents would be "prejudicial to the defendants' right to adjudication of the issues in this civil action in an

uncolored and unbiased climate, including a fair trial.' " *Halkin*, at 181-82. The trial court issued the order, apparently considering it routine.

The Court of Appeals, noting that the case would be tried to the court rather than to a jury, found these allegations inadequate to support the order.

In *Halkin* there were no rights of privacy to be protected by the order. The Court of Appeals, not content to merely hold that the court had abused its discretion under the circumstances of the case, devised a set of standards which could hardly be more onerous, had the court found the "prior restraint" doctrine applicable.<sup>6</sup>

The parties objecting to a protective order in *San Juan Star* were not litigants but rather were members of the media who desired to obtain information from attorneys who were subject to such an order. The First Circuit Court of Appeals gave much more weight than did the *Halkin* court to the litigant's right to privacy and to the effect of publicity upon the proper functioning of the discovery process. Nevertheless, the court, rather than permit the lower courts to continue to function under the rule as it is presently worded, conceived a set of criteria for determining whether a protective order should issue. These criteria were somewhat less stringent than those

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<sup>6</sup> The court said:

"Initially, the trial court must determine whether a particular protective order in fact restrains expression and the nature of that restraint. First Amendment interests will vary according to the type of expression subject to the order. An order restraining publication of official court records open to the public, or an order restraining political speech, implicates different interests than an order restraining commercial information. The interests will also vary according to the timeliness of the expression. An order restraining highly newsworthy information raises a different issue than a temporary restraint of materials having 'constant but rarely topical interest.'

"The court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." (Footnotes omitted.) *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979).

adopted in *Halkin*, but would nevertheless impose an added burden upon the trial court in determining whether to issue the protective order. The court characterized its standards as one "of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake". *San Juan Star*, at 116.

In our view, the procedures adopted by these courts for the promulgation of protective orders and the criteria for review of those orders are unduly complex and onerous and tend to undermine the objectives of pretrial discovery, which is designed to expedite rather than to hinder the progress of litigation. We do not find them mandated in the decisions of the United States Supreme Court which bear upon this subject.

We observe that the Supreme Court, in cases where it has been called upon to examine the reach of First Amendment protections, has generally taken cognizance of the function which publicity serves in the particular circumstances. For example, in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931), cited in *Halkin*, a newspaper, which was found objectionable because of the scandalous charges which it contained within its covers, had been abated. The Court, reversing, stressed the fact that the published charges were made against public officials, that for 150 years there had been almost an entire absence of attempts to restrain publications relating to malfeasance of public officers, indicating a deep-seated conviction that such restraints would violate constitutional rights, and that the growing complexity of society and the prevalence of organized crime in large cities made a vigilant press all the more necessary.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971), the Court reversed an injunction directed against the distribution of leaflets (evidently racist in their content).

These cases are concerned with rights of advocacy, and the dissemination of ideas, which lie at the core of First Amendment protection. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978). There is no advocacy or abstract discussion involved here—only the reporting of supposed facts elicited in discovery.

The rationale of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975) is significant here:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See *Sheppard v. Maxwell*, 384 U. S. 333, 350 (1966).<sup>7</sup>

In answer to the respondent's contention that the efforts of the press had infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim, the Court said that the commission of crime, prosecutions resulting from

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<sup>7</sup> Cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) where it was held that the United States Constitution does not give the public an affirmative right of access to a pretrial hearing, if all the participants agree that it should be closed to protect the fair trial rights of the defendant. The Court said that publicity concerning pretrial suppression hearings poses special risks of unfairness because it may influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

The Court also said that the adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation. It said that at common law pretrial proceedings, because of the concern for a fair trial, were never characterized by the same degree of openness as were actual trials.



it, and judicial proceedings arising from the prosecutions thereof are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), a case in which the Court upheld the right of the press to attend criminal trials, Justice Brennan pointed out principles which are relevant in weighing the interest of the media in access to governmental proceedings. He said:

An assertion of the prerogative to gather information must . . . be assayed by considering the information sought and the opposing interests invaded.

. . . [T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Cf. *In re Winship*, 397 U. S. 358, 361-362 (1970). Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is *important in terms of that very process*.

(Footnote omitted. Italics ours.) *Richmond Newspapers*, at 588-89.

Thus, it is evident that the Court's concern for the protection of First Amendment rights, at least insofar as access to governmental processes is concerned, increases in proportion to the intensity of the legitimate interest which the public has in learning about those processes. The conduct of public officials and the proceedings at trial are of vital concern to the people, the one because of their interest in the public functions which

these officials perform and in their integrity, ability and diligence, and the other additionally, because of their interest in seeing that constitutional rights are protected and justice done. The need for information upon these matters is engendered by the rights and responsibilities the citizen has in choosing those who will govern him and administer justice and in pursuing the changes in law which will correct the inadequacies which he may find in the functioning of his government.

A case which is of particular significance here is *Landmark Communications, Inc. v. Virginia*, *supra*. There, a statute made it a crime to divulge information regarding proceedings before a state judicial review commission. For printing in its newspaper an article accurately reporting on a pending inquiry by the commission and identifying the judge whose conduct was being investigated, the appellant publisher was convicted of violating the statute.

The Court held that the First Amendment does not permit the *criminal punishment of third persons who are strangers* to proceedings before such a commission, for publishing or divulging truthful information regarding confidential proceedings of the commission.

No reporter, employee, or representative of Landmark had been subpoenaed by or had appeared before the commission in connection with the proceedings described in the article.

In reaching its conclusion that the conviction violated the defendant's First Amendment rights, the Court took care to note that the case did not involve a constitutional challenge to the State's power to keep the commission's proceedings confidential or to punish participants.

The Court cited *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434 (1966) where it had said that, whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. The operations of courts and the judicial conduct of judges are matters of utmost public concern.

It quoted from *Sheppard v. Maxwell*, 384 U.S. 333, 350, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966):

A responsible press has always been regarded as the handmaiden of effective judicial administration . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

It found that the operation of the judicial inquiry commission was a matter of public interest, necessarily engaging the attention of the news media. The article published provided accurate factual information about a legislatively authorized inquiry pending before the commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.

Recognizing that the confidentiality of the proceedings served legitimate state interests, the Court nevertheless found those interests insufficient to justify criminal sanctions for publication, *when imposed upon nonparticipants*. It noted that a number of states punished breaches of confidentiality by participants through contempt proceedings, and that more than 40 states having similar provisions did not find it necessary to provide criminal sanctions.

It observed that protection of the reputation of judges and the judicial system was not a sufficient ground for the sanction—judges and the court system are no more immune from scrutiny and criticism than other public officials.

Finally, the Court in *Landmark Communications, Inc., v. Virginia*, *supra* at page 845, said that much of the danger to the administration of justice posed by publicity could be eliminated through "careful internal procedures to protect the confidentiality of Commission proceedings."

We find implicit in this opinion a recognition that there are governmental proceedings which legitimately may be closed to the public and the press, and the State may punish those participating in such proceedings if they disobey an order to keep them confidential. *See also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n.21, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981), where the Court said:

In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors. Our decision regarding the need for careful analysis of the particular circumstances is limited to the situation before us—involving a broad restraint on communication with class members [in a Civil Rights Act class action, 42 U.S.C. 2000 *et seq.*]. We also note that the rules of ethics properly impose restraints on some forms of expression. *See e.g.*, ABA Code of Professional Responsibility, DR 7-104 (1980).

We have seen that in *Gannett v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), it was held that, in order to protect the right of a defendant to a fair trial, the court may close a preliminary hearing to the public and the press. We find implicit in that holding a recognition that when a hearing is closed, the court may properly restrict the use which participants in the hearing may make of information gained in that proceeding, forbidding its disclosure to members of the public, including the media. That being the case, there is no sound reason why the same restrictions may not be imposed in discovery proceedings.

To begin with, the public generally does not have the same interest in the conduct of civil actions that it has in criminal actions, for the public is a party to a criminal action, the plaintiff being the state or other governmental body. Also, the functioning of the adversary system plays an important role in avoiding abuses in civil proceedings. With respect to discovery proceedings, the strong governmental interest in effectuating the purposes of those proceedings makes it imperative that their integrity be preserved. Essential to that integrity is the protec-

tion of the party against whom discovery is sought from unnecessary "annoyance, embarrassment, oppression, or undue burden or expense". CR 26(c). Such protection must include protection of a party's privacy interest in avoiding unwanted publicity. This objective serves not only the State's interest in protecting its citizens in their legitimate expectations of privacy, but also, and perhaps more importantly, the State's vital interest in seeing that justice is administered upon all of the relevant facts, freely and truthfully disclosed by the parties.

Inherent in CR 26(c), providing for protective orders, is a recognition that parties generally are not eager to divulge information about their private affairs and, that when called upon to do so in a lawsuit, will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation. Many will be tempted to withhold information and even to shade the truth, where otherwise they would not do so. And, as the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.

It is perhaps a matter of speculation as to what the effect will be in any given case. However, that which concerns us is the cloud which will be cast upon the integrity of the discovery process if the courts permit such intrusions.

As compared with the interests served by the rule, the interest of the public in knowing what information is given in such proceedings is, in the ordinary case, minimal. Of course, there are cases which involve matters which do concern the public generally (antitrust litigation being an example), and where privacy interests are not involved, there may be good reason to deny a protective order. In such cases, the tendency to undermine confidence in the integrity of the process may be negligible, and the objecting party may have difficulty in showing good cause, as was the case in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).



It does not seem likely that, where a matter is considered newsworthy, the media will be without its own means of investigating the facts. In the present case, it is evident from the record that the defendants had obtained access to a sufficient amount of information about the plaintiff and his organization to produce a vivid series of accounts about their activities.

We are not told what interest of the public is served by the newspaper's further exposure of this allegedly religious sect,<sup>8</sup> unorthodox though it undoubtedly is, but we assume that publishers could rightly find it newsworthy. It may have some significance with respect to governmental activity, but, if so, that fact has not been brought to light. If the plaintiff and his associates are engaged in unlawful activities, it is safe to assume what with the exposure that has already been made, the appropriate law enforcement agencies will take action. In view of the fact that the discovery rules have a long history of functioning without exposure of litigants to unwanted publicity and at the same time the news media has flourished, giving extensive coverage to the bizarre and the unorthodox, we do not perceive that continued protection of the discovery proceedings will constitute a substantial impediment to news gathering in this area.

As the Supreme Court has more than once remarked, the function of the media in serving not only the public's need to know but the integrity of governmental functions themselves is of great importance in balancing First Amendment rights against other interests of the state. Here, there is nothing to indicate that publicity given to the evidence furnished by a party in a pretrial proceeding will in any way tend to promote the proper functioning of such proceedings. There is involved here no evaluation or criticism of judges or other officials administering the system nor of the system itself, but only a

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<sup>8</sup> "A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; . . . [and] the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." (Footnote omitted.) See *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981).

proposal to exploit the fruits of that system. Thus, this vital consideration which has sometimes led the courts to favor the interests of speech and press over the rights of a defendant in a criminal trial are entirely absent.

Assuming then that a protective order may fall, ostensibly, at least, within the definition of a "prior restraint of free expression", we are convinced that the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the "heavy burden" of justification. The need to preserve that integrity is adequate to sustain a rule like CR 26(c) which authorizes a trial court to protect the confidentiality of information given for purposes of litigation.

The rule itself imposes no affirmative obligation upon a participant to refrain from giving publicity to information derived in a discovery proceeding. However, as Chief Justice Burger has remarked, it has customarily been taken for granted that such information is given solely for purposes of litigation. It is evident that the rule contemplates that participants will not abuse the process, but if they do attempt or propose to do so, the party against whom such action is directed may apply for protection. Our understanding of the rule, contrary to that of the federal circuit courts in *In re Halkin, supra*, and *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), is that "good cause" is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process. In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. The judge's major concern should be the facilitation of the discovery process and the protection of the integrity of that process, which necessarily involves consideration of the privacy interest of the parties and, in the ordinary case at least, does not require or condone publicity.

Here, there is no question but that the defendants were threatening to publicize the information which they gained through the discovery process. They insist upon their right to do so. The information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had a recognizable privacy

interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression.

Of course, by undertaking the lawsuit the plaintiff necessarily consented to the exposure of all relevant evidence admissible and admitted at trial, which will then be a matter of public record and available for publication by the defendants or any other person. But until and unless the fruits of the discovery are made public through the judicial process (or by the plaintiffs or others independently of discovery),<sup>9</sup> plaintiffs are entitled to the protection of the court.

We find no abuse of discretion and affirm the issuance of the protective order.

[2] Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and

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<sup>9</sup> The defendants express some concern that the protective order is too broad in that it does not make it clear that the defendants may publish the information if it is revealed in open court or otherwise made public by the plaintiffs. This may be an unnecessarily strict construction of the order; but to remove any doubt, the defendants should apply to the court to clarify the order, consistent with this opinion.

find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

With respect to this order, also, we find no abuse of discretion.

The orders are affirmed.

BRACHTENBACH, C.J., and STAFFORD, WILLIAMS, and DORE, JJ., concur.

DOLLIVER, J. (concurring)—Although I agree with the result reached by the majority, I believe the court should state categorically that discovery under the standards of CR 26(c) and the protective orders of the court in this case do not require a First Amendment analysis. The United States Supreme Court has wisely avoided the morass of rather tendentious First Amendment commentary which has afflicted some of the federal courts in recent cases. *E.g., In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). We should do the same. I agree with the comment of the majority that "we are not convinced that the *Halkin* approach properly serves the administration of justice." Majority opinion, at 236. To this I would add it also does little to advance the cause of First Amendment protections. *See International Prods. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

In his dissent to *In re Halkin*, Judge Wilkey states with great clarity why a protective order such as in this case is not an assault on the Bill of Rights:

Within the framework of the discovery laws, then, it is clear that whatever rights a party may have in the materials that it has exacted from another party in discovery are qualified by conditions properly imposed by the court in its discretion under Rule 26(c). There is no "waiver" of First Amendment

rights, as the majority tries to term it; it is simply that when a party uses the court's process in a manner which may be unfair to the other party and is unrelated to the litigation purpose of discovery, the court has the power and responsibility to take whatever action is necessary to protect its process from abuse, and a protective order requiring a litigant to use the products of discovery in a manner consistent with the purposes of discovery is a permissible "prior restraint" if it meets the standards set forth in Rule 26(c).

The majority argues that revelation of governmental action which sometimes accompanies civil litigation should not be kept from the public. Of course, this material on which petitioners wish to hold a press conference now *will* be made public at the trial. Even matter which has been discovered, but which may not be deemed relevant to issues at trial, can later be fully disclosed and discussed, as I understand the purpose and tenor of the trial court's order. No suppression of free speech is involved in this case; what is at issue is the orderly control of the judicial process by the trial judge.

This is illustrated by the striking anomaly in the majority opinion's logic which the majority does not adequately explain. It is conceded "that plaintiffs do not have a First Amendment right of access to information not generally available to members of the public. *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); see also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609-10, 98 S.Ct. 1306 [1318], 55 L. Ed. 2d 570 (1978)." Federal Rule of Civil Procedure 26(c)(1) allows the district court to prevent discovery altogether, if good cause is shown ("may . . . order . . . that the discovery not be had"). No one argues that such prohibition raises any First Amend-



ment issues or problems, and apparently it is conceded by all that such an order may be based on mere "good cause," and the district court need not meet any more stringent test such as "reasonable likelihood of harm" or "serious and imminent threat," etc., before it can issue such an order. However, the majority holds that when a *less serious* intrusion of the district court is made, *i.e.*, it attempts to set limits on the use of the information already received, it must meet *more stringent* First Amendment standards.

Thus the anomalous situation results, in which the district court is completely unfettered by First Amendment considerations when it is most intrusive, *i.e.*, prohibits discovery altogether, and is more restricted when it is less intrusive, *i.e.*, puts limits on the use of material which it allows to be discovered. This has nothing to do with any "benefits-privileges" analysis, as the majority interprets my position (note 28). It is simply the principle that the greater (the power to prohibit altogether) includes the lesser (the power to grant with conditions), a bit of logic which has been recognized as valid as least since the ancient Greeks.

It seems to me, then, that the majority's elaborate First Amendment analysis is gratuitous. Since an order properly issued under Rule 26(c) is constitutional, the focus of inquiry should be whether or not "good cause" has been shown for the order under review within the meaning of Rule 26(c). If the district court properly issued the order under Rule 26(c), then the order is consistent with First Amendment safeguards, and there is no reason to embark on an independent First Amendment analysis. If the district court did not properly issue the order under Rule 26(c), then it is violative of statutory standards, and there is again no reason to embark on a First Amendment analysis.

I concur with the view of Judge Wilkey. Subjecting the discovery process to the strictures of the First Amendment may increase trial courts' reluctance to allow discovery in the first place. Trial judges who fear the impairment of their ability to regulate abuses once the discovery process has started may resort to the more easily justified but more drastic alternative of denying discovery altogether. The analysis represented by the *In re Halkin* majority and by the dissent here neither advances the administration of justice nor guarantees any rights contained in the First Amendment.

BRACHTENBACH, C.J., and DIMMICK, J., concur with DOLLIVER, J.

UTTER, J. (dissenting)—I must dissent because I cannot agree with the majority's analysis. While purporting to apply the doctrine of prior restraint to this case, the majority's ruling for all practical purposes makes discovery a category exempt from First Amendment scrutiny. I would vacate the existing protective order and remand for reconsideration in light of the guidelines set forth in this opinion. First Amendment interests must be balanced against legitimate concerns for the administration of the discovery process, with the ultimate burden of justification resting with the party seeking the restraint.

The majority opinion expresses doubt as to the applicability of the prior restraint doctrine with respect to discovery protective orders, majority at 231, but nevertheless finds CR 26(c) justified even under the "heavy burden", majority at 239, imposed under the prior restraint doctrine. While voicing adherence to the prior restraint doctrine, the majority's analysis reflects more its initial skepticism as to the doctrine's application. That skepticism is warranted but that does not mean First Amendment interests need not be carefully balanced in issuing protective orders. By failing to apply in earnest the traditionally stringent standards of prior restraint, the majority both dilutes the future value of the doctrine in a proper context and neglects the primary duty of the court in this case: establishing the appropriate standard by which trial courts may issue protective orders without violating the requirements of the constitution.

## I

The thrust of the majority's analysis is that the court need not reach the question of whether the prior restraint doctrine applies to protective orders because even under the heavy burden of that doctrine, "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification." Majority at 256. Since, under the majority's analysis, CR 26(c) is justified even under the stringent prior restraint test, protective orders may be justified on a showing of good cause which the majority defines as a showing of any enumerated harm threatened that "can be avoided without impeding the discovery process." Majority at 256. While I agree with the majority that the interests it identifies are important factors to weigh in determining whether a protective order should issue, such interests do not exempt from First Amendment analysis the many situations that arise under the rule. While purporting to hold CR 26(c) is a justified prior restraint, the majority's position is actually tantamount to holding discovery is an excepted category from First Amendment scrutiny—a position unsupported in the law. *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 420 U.S. 969 (1975); *In re Halkin*, 598 F.2d 176, 186-87 (D.C. Cir. 1979).

Prior restraints are permitted only in the most exceptional cases. *United States v. The Progressive, Inc.*, 467 F. Supp. 990, *reconsideration denied*, 486 F. Supp. 5 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights". *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). The Supreme Court has described the doctrine as "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart*, *supra* at 562. There is a heavy presumption against the constitutionality of prior restraints. To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition against

prior restraints . . ." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).

[The] publication [sought to be restrained] must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . .

*New York Times Co. v. United States*, 403 U.S. 713, 726-27, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971) (Brennan, J., concurring). Even when the prior restraint is imposed to protect a "vital constitutional guarantee . . . the barriers to prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Ass'n v. Stuart*, *supra*, at 570. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971); *Carroll v. President & Comm'rs*, 393 U.S. 175, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931); *Seattle v. Bittner*, 81 Wn.2d 747, 505 P.2d 126 (1973); *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958).

Yet faced with this almost insurmountable hurdle, the majority holds protective orders and the multitude of situations under which they might arise are justified as long as a threatened harm can be shown and the protective order will not impede discovery. Had the majority actually applied the traditional doctrine of prior restraint, neither CR 26(c) nor the protective order in this case would have withstood the constitutional test. Even constitutional concerns for privacy do not rise to the level of overcoming the presumption of unconstitutionality attached to prior restraints. *Organization for a Better Austin v. Keefe*, *supra* at 418-20.

## II

The protective order's invalidity under the traditional prior restraint test should not resolve this case. While some First Amendment interest does attach to the dissemination of dis-

covery materials, I feel in this context the heavy burden of the prior restraint doctrine is inappropriate. *But see Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972).

As a general proposition, pretrial discovery is public unless compelling reasons exist for denying the public access to the proceedings. *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979); *United States v. IBM Corp.*, 66 F.R.D. 219 (S.D.N.Y. 1974); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973). An individual is entitled to use the fruits of discovery for lawful purposes unless a protective order issues. *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955). While courts have diverged as to the appropriate constitutional standard, there has been little dispute as to the existence of a First Amendment interest in discovery materials. *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); *In re Halkin*, *supra* (majority and dissent concurring on this point); *Koster v. Chase Manhattan Bank*, 8 Media L. Rep. 1155 (S.D.N.Y. 1982); Note, *Protective Orders Prohibiting Dissemination of Discovery Information: the First Amendment and Good Cause*, 1980 Duke L. J. 766 (hereinafter Duke Note); Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645 (1980) (hereinafter Columbia Note). *But cf. Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976) (considering such First Amendment interest waived); *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (court entertained no doubt of constitutionality of protective orders, though it did not deny the existence of First Amendment interests).

Nonetheless, I feel there are factors that distinguish the restraint of a protective order from the prior restraints that have traditionally been accorded such a heavy presumption of invalidity. A protective order is a restraint on expression but "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957)



(Frankfurter, J.). See generally Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539 (1977). Protective orders are unlike classic prior restraints (e.g., administrative licensing schemes) in that they result from an adversary process and can be limited to specific expression. *In re Halkin*, 598 F.2d at 185 nn. 16-17. More importantly, protective orders relate only to material gathered by virtue of the court's processes. As the court in *Koster v. Chase Manhattan Bank*, 8 Media L. Rep. 1155, 1159 (S.D.N.Y. 1982) stated: "[T]he special nature of discovery as a source of information justifies a reduced level of scrutiny." As Judge Wilkey in his dissent to *Halkin* stated, one's interest in disseminating discovery materials is restricted because it is obtained solely by virtue of the court's processes. 598 F.2d at 206. Judge Wilkey concluded that since a court can deny access to discovery altogether without being subject to First Amendment analysis, it is anomalous to make protective orders subject to such First Amendment strictures. Applying the logical construct that the greater includes the lesser, Judge Wilkey concluded the greater power of denying access includes the lesser power of placing restrictions on access, and that both should be subject to the same standard.<sup>10</sup> The notion is plausible, but unfortunately deductive logic is a helpful but not necessarily dispositive aspect of legal analysis. See R. Wasserstrom, *The Judicial Decision*, ch. 2 (1961). The greater does not always include the lesser when it is a constitution and not a syllogism we are expounding. While an individual does not have a right to public employment, the government may not place unconstitutional conditions on such employment:

[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech. For if the government could deny a benefit to a

<sup>10</sup> The majority, too, seems persuaded by the same argument. See its discussion of *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) at page 253. For the same reasons discussed in text, I find its analysis unpersuasive.

person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

*Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). See *In re San Juan Star Co.*, *supra* at 114; Duke Note at 789-90; Columbia Note at 1647 n. 16. Thus, if the court's reason for denying a party access to discovery was to deny the party a First Amendment interest in dissemination of those materials, such denial would be just as invalid as a protective order motivated by similar concerns. Judge Wilkey's affirmation of the highly discretionary good cause standard as a basis for denial of both access and protective orders, while logically plausible, does not follow inevitably from a constitutional analysis.<sup>11</sup>

First Amendment concerns persist even though protective orders should not be subject to a heavy presumption of unconstitutionality. In so concluding, I fall in line with the majority of courts that have considered the question. See *Koster*, *supra* at 1158-59 (and cases cited therein).<sup>12</sup> Unfortunately, the majority's characterization of the good cause

<sup>11</sup> The majority also seems enamored of the idea of waiver in this context, though it is chary of adopting such an approach. See footnote 4. Access to discovery cannot be conditioned on a waiver of constitutional rights, *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1978), nor generally is waiver of constitutional rights implied. *In re Halkin*, *supra*; *Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 142-45, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). But see *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976).

<sup>12</sup> The Supreme Court has not addressed this question directly, but its recent decision in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981) provides a helpful analogy. There the Court struck down a restraining order under Fed. R. Civ. P. 23 as an abuse of discretion, but commented:

Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

standard for such orders does not reflect a concern for the First Amendment interests that must be weighed. By requiring only a showing of one of CR 26(c)'s enumerated harms and that the discovery process not be impeded, the majority does not even require a trial court to look to the countervailing interests of the party against whom the protective order is sought.

### III

Recently, courts have struggled with devising standards by which trial courts should render protective orders when First Amendment interests are at issue. The cases of *Halkin* and *San Juan Star* are notable. While these courts have not evaluated protective orders "by the stringent standards governing classic prior restraints", *Koster*, 8 Media L. Rep. at 1159, they have required more rigorous standards for reviewing "good cause" determinations than "abuse of discretion".<sup>13</sup>

### A

In *Halkin*, the court required "close scrutiny of [the impact of protective orders] on protected First Amendment expression", 598 F.2d at 186, viewing a protective order as a "direct governmental action limiting speech". *Halkin*, at 183. The court set forth a 2-part test of first determining the significance of the First Amendment interests restrained, and second, evaluating the restraint according to three criteria:

the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

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<sup>13</sup> The inconsistency of the majority's approach is made evident by its treatment of *Halkin* and *San Juan Star*. The majority states the standards articulated by those courts are not mandated by the constitution. Majority at 248. Yet the standards developed in both cases are less stringent than the heavy presumption against validity, which the majority purports to apply in dispensing with this case.

(Footnotes omitted.) *Halkin*, at 191. This approach requires the balancing of First Amendment interests against the harm avoided by the protective order, and imposes requirements of specificity, narrowness and an exhaustion of less intrusive alternatives.

I agree with the *Halkin* court that a trial court's ability to deny access does not dispose of the First Amendment concerns as to protective orders, but I do not feel the First Amendment analysis is the same regardless of the mode by which information is acquired. See *Halkin*, at 187-88, citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778, 783, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). The court has legitimate concerns in administering the discovery process, which may affect the extent to which First Amendment expression remains unimpaired. The same evil does not result "from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1448 (1968).

While the *Halkin* court does not focus on these legitimate concerns, the standards it articulates provide trial courts with the flexibility needed to address such concerns. See *Brink v. DaLesio*, 82 F.R.D. 664, 678 (D. Md. 1979) ("At most, the [*Halkin*] opinion will perhaps prompt a more reasoned and precise statement by judges in issuing Rule 26(c) orders.")

## B

The court in *San Juan Star* established a standard somewhat less restrictive than the *Halkin* majority; a standard of good cause that "incorporates a 'heightened sensitivity' to the First Amendment concerns at stake", 662 F.2d at 116. Judge Coffin articulated this heightened sensitivity thus: "We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary." *San Juan Star*, at 116. With respect to the "threatened harm", Judge Coffin felt it should be evaluated on a "sliding scale . . . as the

potential harm grows more grave, the imminence necessary is reduced." *San Juan Star*, at 116. More explicitly than did the court in *Halkin*, the court in *San Juan Star* recognized the legitimate concerns a court has in administering the discovery process which might justify subordination of First Amendment interests that could not otherwise be limited. Concerns for the administration of the discovery process and for minimizing injury to parties are legitimate bases for restricting First Amendment interests in the discovery context.

### C

While the United States Supreme Court has not addressed First Amendment concerns in discovery, I believe First Amendment interests must be weighed much as the Court required in *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). In *Pickering*, the Court dealt with the question of a teacher's First Amendment rights within the context of his employment. While the Court rejected unequivocally the Illinois Supreme Court's assertion that an individual may be forced to give up constitutional rights as a condition of public employment, the Court conceded:

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

391 U.S. at 568. Because of the multitude of situations that might arise, the *Pickering* Court did not presume to set forth any general standard for balancing the respective interests. Nor would I presume to do so in this case. Nonetheless, the



*Pickering* Court did require that the school's legitimate interests *actually* be served by a limitation on speech, and in a subsequent case dealing with the same concerns, the Court required a material and substantial interference with a school's interests in order and discipline to justify curtailment of First Amendment liberties. *Tinker v. Des Moines Indep. Comm'ty Sch. Dist.*, 393 U.S. 503, 508-09, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). I believe both *Halkin* and *San Juan Star* provide helpful guidelines to a trial court in striking the right balance. See Duke Note, *supra*, at 793-99. Below, I outline some of the questions a trial court should ask in determining if a protective order should issue:

1. What is the extent of the First Amendment interest enjoined by the protective order?

As the *Halkin* court indicated, "First Amendment interests will vary according to the type of expression subject to the order". 598 F.2d at 191. The majority distinguishes *Halkin* and *San Juan Star* as cases involving intense public concern while the matters before us are of less public consequence. Even assuming the validity of the majority's assertion, it has not provided an analytical framework by which we as a reviewing court will be able to differentiate this case from one in which the First Amendment interest is more substantial.

2. What is the harm threatened by failure to issue a protective order?

As the *Halkin* court indicated, "widely varying interests" may be advanced in support of a protective order. The rule itself allows for such breadth of interest: "the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." CR 26(c). As Judge Coffin indicated, the degree of imminence of any harm will vary in inverse proportion to the magnitude of the harm. An additional concern here is the question of how central the information is to the case. If the information is of central relevance, a party's

interest and expectation in privacy might be diminished. At the same time, the centrality of the information may affect a party's right to a fair trial.

3. What is the status of the parties seeking a protective order and against whom the protective order is sought?

The expectation of privacy will vary if the party seeking the order is a public body or a private person, or if the individual is a nonparty or central litigant. If a protective order is sought against a suing party, it might impede the party's First Amendment right to freely litigate, especially if such action is brought for a public purpose (*e.g.*, civil rights, antitrust actions). See *Halkin*, 598 F.2d at 187; *In re Primus*, 436 U.S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978). If, on the other hand, the defendant is the party against whom the protective order is sought, the First Amendment right to litigate seems less in jeopardy. In addition, the court must be sensitive to concerns militating in favor of a protective order, namely a party's First Amendment interest "to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977). As one commentator has indicated, "In the absence of sufficient justification, a court's *denial* of a motion for a protective order may itself be an unconstitutional infringement of the producing party's first amendment rights." (*Italics mine.*) Duke Note, 1980 Duke L.J. at 793.

4. What specific concerns does the court have in issuing protective orders?

The court must determine whether the protective order will facilitate the administration of justice or undermine one of the purposes of the litigation, *i.e.*, whether it prevents an abuse of process by a party or restrains a significant First Amendment interest. Besides the court's concern for minimizing injury to parties, the court has separate concerns for ensuring discovery is expeditious. If the absence of a protective order might mean a party's evasion of its duty to disclose and an end to voluntary compliance with discovery processes, a protective order may be the best means of insuring the orderly administration of discovery.

Once the interests for and against a protective order have been identified, the court must balance them, with the burden of justification resting on the party seeking the protective order. No simple rule will apply in all cases. If the government seeks to protect from dissemination highly relevant information regarding graft among public officials because of the annoyance and embarrassment of public disclosure, the balance will be struck differently than when a private party seeks to protect from public scrutiny personal details which are of questionable materiality to the case. Needless to say, courts should attempt to find the least restrictive accommodation of all interests, those of the parties and the court. See *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979); *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981). Often the only alternative to a protective order will be denial of access—a result which the *Halkin* court indicated benefits no one.<sup>14</sup> A natural concomitant of finding the best accommodation of all interests is that the protective order be narrow and precise to protect against the specific harm threatened. *Halkin*, at 191; *San Juan Star*, at 116. This does not mean that a court must supervise the discovery of every document. *San Juan Star*, *supra*; *Tavoulareas v. Piro*, 93 F.R.D. 11, 24 (D.D.C. 1981). To require as much would substantially undermine the purposes of discovery. Nevertheless, the court should restrain from publication only that which need be to prevent the harm that has been identified. Nor should the court restrain information for a period of time longer than is necessary. See *Halkin*, *supra*. Implicitly, this would mean the termination of the protective order once information protected is a matter of public record.

The above discussion is meant as a guide to trial courts, not as a fixed rule. The major premise of the discussion is that where First Amendment interests can be identified, the harm against which a protective order guards must be balanced against those First Amendment interests, with the burden of justification lying with the party seeking the restraint.

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<sup>14</sup> The *Halkin* court did identify alternatives to protective orders when the interest protected is an individual's right to a fair trial. See *Halkin*, 598 F.2d at 195.

## IV

Turning to this case, the trial judge issued both a protective order and a memorandum opinion regarding the protective order. The primary problem with the protective order is that it does not attempt to weigh petitioner's First Amendment interests in determining whether a protective order should issue. As the trial judge states at page 2 of his memorandum opinion:

Protective Orders are entered routinely in cases where the party seeking the Protective Order has a reasonable basis for its request that the information gained through discovery be used by the discovering party for no purpose other than the legitimate purposes of the case in which discovery was granted.

Such a test, which is identical to the majority's standard, does not require any "heightened sensitivity" to First Amendment concerns.

In addition, the court's "reasonable basis" in this case is simply too speculative and general to justify the restraint of First Amendment freedoms. The trial judge states on page 4 of his memorandum opinion:

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

And the protective order states:

the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts . . .

As a general proposition, the court's statement is certainly true in some cases. But is it true in this case? Would the risk of dissemination cause Rhinehart to drop his libel action? Or are there other specific concerns for minimizing injury and embarrassment to respondents that outweigh the petitioner's First Amendment interest in dissemination? Such concerns might well exist in this case, but they are not identified by the court. As a threshold consideration, the trial court must identify the specific harm in this case that warrants a protective order. Courts have generally required a "particular and specific demonstration of fact" to justify protective orders. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974). See *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (clearly defined and very serious injury); *Neonex Int'l Ltd. v. Norris Grain Co.*, 338 F. Supp. 845 (S.D.N.Y. 1972); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477 (W.D. Mo. 1950); *United States ex rel. Edelstein v. Brussell Sewing Mach. Co.*, 3 F.R.D. 87 (S.D.N.Y. 1943). Cf. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 68 L. Ed. 2d 693, 101 S. Ct. 2193, 2200 (1981) (Court struck down restraining order under Fed. R. Civ. P. 23 which affected First Amendment interests as an abuse of discretion because it was not based on a "clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."). Here a specific finding by the court is required to insure that the restraint is justified.

On remand, I would call attention to two other concerns I have with the protective order. The order is narrow in that it restricts only the use of information gained through the discovery processes. Trial court memorandum opinion, at 3. The protective order is not narrow in two important respects, however. While Paragraph 2 of the order seems to limit restrictions on dissemination to financial data and certain names and addresses, Paragraph 3 states broadly (and somewhat inconsistently) "information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for



publication or dissemination." While Paragraph 3 is apparently limited by the specific information discussed in Paragraph 2, the court's opinion perpetuates the notion that *all* discovery information is restrained by the protective order.

The intent and purpose of the protective order will be that the discovering party make no use or dissemination of the information gained through discovery other than such use as is necessary in order for the discovering party to prepare and try the case. It follows that information gained through the discovery process will not be published by the Seattle Times or made available to any news media for publication or dissemination.

Trial court memorandum opinion, at 3. Similarly, the restraint is not limited in time. Literally, the order restrains from publication information that is introduced as evidence at trial. On remand, I would require the court, if it should issue an order, to specify the conditions of the restraining order more carefully.

Through this opinion, I do not mean to imply that a protective order may not issue in this case. I would simply require the trial court to undertake the *ad hoc* balancing test outlined above. This the trial court has not done. A specific harm has not been identified by the trial court, First Amendment interests are given no recognition, and the order does not reflect the narrowness which derives from a concern for such interests. I would vacate the protective order and remand to the trial court to reconsider the request for a protective order in light of the concerns identified in this opinion.

PEARSON, J. concurs with UTTER, J.

**APPENDIX D**

**THE SUPREME COURT OF WASHINGTON**

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**Nos. 47938-1, 48155-5**

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**KEITH MILTON RHINEHART, *et al.*,**  
***Respondents,***

**v.**

**THE SEATTLE TIMES COMPANY, *et al.*,**  
***Petitioners.***

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**ORDER DENYING MOTION FOR RECONSIDERATION**

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The Court having decided by majority vote that the respondents' motion for reconsideration should be denied,

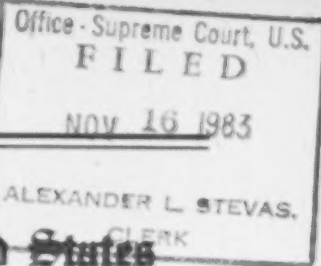
It is ordered that the motion be and it hereby is denied.

Dated this 27th day of January, 1983.

/s/ WILLIAM H. WILLIAMS

*Chief Justice*

No. 82-1721



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a Delaware  
corporation, d/b/a THE SEATTLE TIMES;  
WALLA WALLA UNION-BULLETIN, INC.;  
ERIK LACITIS and JANE DOE LACITIS;  
JOHN WILSON and REBECCA WILSON;  
JOHN MCCOY and KAREN MCCOY,

*Petitioners,*

v.

KEITH MILTON RHINEHART, a single person;  
the AQUARIAN FOUNDATION, a Washington  
not-for-profit corporation; KATHI BAILEY,  
a married person, LILLIAN YOUNG, a married  
person, TONI STRAUCH, a married person,  
SYLVIA CORWIN, and ILSE TAYLOR, representing  
women who were members of the Aquarian  
Foundation on or after March 17, 1978,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Washington

**JOINT APPENDIX**

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EDWARDS & BARBIERI  
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*Counsel for Petitioners*

*Counsel for Respondents*

PETITION FOR CERTIORARI FILED APRIL 22, 1983.  
CERTIORARI GRANTED OCTOBER 3, 1983.

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Q. Opinion of the Washington Supreme Court, dated December 2, 1982, as changed on December 13, 1982 .....	100a

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

*February 15, 1980:* Plaintiffs Keith Milton Rhinehart, the Aquarian Foundation, Kathi Bailey, Lillian Young, Toni Strauch, Sylvia Corwin, and Ilse Taylor file their Complaint for Defamation and Invasion of Privacy in the Superior Court of the State of Washington for King County.

*April 11, 1980:* Plaintiffs file amendments to their complaint to correct certain scriveners' errors.

*May 16, 1980:* Defendants The Seattle Times Company, Walla Walla Union-Bulletin, Inc., Erik Lacitis, and John McCoy file their answer to plaintiffs' complaint.

*June 19, 1980:* Defendants file a motion to compel discovery.

*June 30, 1980:* Plaintiffs file responses to defendants' first request for production documents.

*July 10, 1980:* Plaintiffs file various documents in opposition to defendants' motion to compel.

*July 15, 1980:* Plaintiffs file the Affidavit of Keith Milton Rhinehart and the Affidavit of Jack E. Wetherall in opposition to defendants' motion to compel discovery.

*July 25, 1980:* Plaintiffs file answers to defendants' first interrogatories.

*August 7, 1980:* Superior Court enters the first Order Compelling Discovery.

*October 13, 1980:* Defendants file a notice of deposition of Merrill Lynch pursuant to subpoena duces tecum.

*October 23, 1980:* Merrill Lynch files an objection to defendants' subpoena.

*December 5, 1980:* Defendants file their second motion to compel discovery and submit a memorandum in support.

*December 16, 1980:* Plaintiffs file the Affidavit of Linda E. Collier in opposition to defendants' second motion to compel discovery.



*December 17, 1980:* Plaintiffs file an amended response to defendants' first request for production of documents to the Aquarian Foundation, the Affidavit of Laurel J. Peterson, and a brief in opposition to defendants' motion together with a request for protective orders.

*December 19, 1980:* Plaintiffs serve the Affidavit of Catherine Harold [filed November 25, 1981].

*January 8, 1981:* Defendants file a brief in opposition to plaintiffs' request for protective orders and a reply memorandum in support of their second motion to compel discovery.

*January 21, 1981:* Plaintiffs file a response in support of their protective orders.

*February 25, 1981:* Superior Court serves upon counsel a letter ruling on defendants' second motion to compel discovery and plaintiffs' motion for protective orders [filed October 14, 1981].

*March 6, 1981:* Plaintiffs file a motion to reconsider the court's letter decision granting defendants' motion to compel.

*March 11, 1981:* Defendants file a supplemental memorandum in response to the court's letter ruling of February 25, 1981.

*April 13, 1981:* Plaintiffs file the Affidavit of Jillene Avalos and the Affidavit of Linda Dunn in support of motion to reconsider and serve the Affidavit of Catherine Harold [filed November 25, 1981] and the Affidavit of Robert Plante [filed November 25, 1981].

*April 15, 1981:* Defendants file a reply memorandum in support of their second motion to compel discovery and the Affidavit of Evan L. Schwab.

*May 7, 1981:* Plaintiffs file the Affidavit of Marilou McIntyre.

*May 17, 1981:* Plaintiff Aquarian Foundation files responses to defendants' amended first request for production of documents.

*May 21, 1981:* Plaintiffs Bailey, Young, and Strauch file responses to defendants' amended first request for production of documents.

*June 12, 1981:* Superior Court files Opinion Granting Plaintiffs' Motion for Protective Order.

*June 17, 1981:* Plaintiff Rhinehart files responses to defendants' amended first request for production of documents.

*June 26, 1981:* Plaintiffs file the Supplemental Affidavit of Marilou McIntyre.

*June 26, 1981:* Superior Court enters the Order Compelling Discovery.

*June 26, 1981:* Superior Court enters the Protective Order.

*June 26, 1981:* Defendants file a notice for discretionary review of the Protective Order to Washington Court of Appeals, Division I.

*July 22, 1981:* Plaintiffs file a notice for discretionary review of the Order Compelling Discovery.

*July 27, 1981:* Washington Court of Appeals concludes that the issues presented are of "such broad public import" that motions for discretionary review should be certified directly to the Washington Supreme Court.

*October 5, 1981:* Washington Supreme Court grants defendants' motion for discretionary review of the Protective Order and orders accelerated review.

*November 3, 1981:* Washington Supreme Court grants plaintiffs' motion for discretionary review of the Order Compelling Discovery and consolidates both appeals for joint argument.

*December 2, 1982:* Washington Supreme Court issues its opinion in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982).

*December 13, 1982:* Washington Supreme Court amends its opinion.

*December 22, 1982:* Plaintiffs move for reconsideration of Washington Supreme Court decision.

*January 27, 1983:* Washington Supreme Court issues an order denying the motion for reconsideration.

**APPENDIX A**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**

**FOR KING COUNTY.**

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**No. 80-2-01460**

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KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

The Seattle Times Company, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

*Defendants.*

**COMPLAINT FOR DEFAMATION AND INVASION OF  
PRIVACY**

**I. PARTIES PLAINTIFF**

(a) Plaintiff Keith Milton Rhinehart is a private figure, ecclesiastic leader of the Aquarian Foundation, and resident of the State of Washington.

(b) Plaintiff the Aquarian Foundation is a not-for-profit religious corporation organized under the laws of the State of Washington.

(c) Plaintiffs Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin and Ilse Taylor are women and members of the

Aquarian Foundation. Lillian Young is married, the mother of four, and a resident of the State of Hawaii. Kathi Bailey is married, a Washington resident, now domiciled in the State of Hawaii. Toni Strauch is married, a mother and a resident of the State of Hawaii. Sylvia Corwin and Ilse Taylor are residents of the State of Washington.

## II. CORPORATE PARTIES DEFENDANT

(a) The Seattle Times Company (hereinafter "Seattle Times") is a corporation incorporated under the laws of the State of Delaware, on information and belief, having its principal place of business in the State of Washington, which distributes its products in the States of Hawaii, Washington, California, Alaska, Oregon and elsewhere.

(b) The Walla Walla Union-Bulletin, Inc. (hereinafter "Walla Walla Union-Bulletin") is a corporation incorporated under the laws of the State of Washington, on information and belief, having its principal place of business in Washington. On information and belief, the Walla Walla Union-Bulletin is affiliated with or owned by or has a correspondent relationship with the Seattle Times.

(c) Both corporate defendants are "for-profit" organizations, deriving their revenue from the distribution and circulation of daily newspapers and other products both within and without the State of Washington.

## III. INDIVIDUAL PARTIES DEFENDANT

(a) Erik Lacitis, a staff columnist for the Seattle Times, and Jane Doe Lacitis, his wife, if any, are residents of the State of Washington.

(b) Defendant John Wilson, a writer for the Seattle Times, and Rebecca Wilson, his wife, are residents of the State of Washington.

(c) Defendant John McCoy, a writer for the Walla Walla Union-Bulletin, and Karen McCoy, his wife, are residents of the State of Washington.

(d) All acts complained of with reference to the defendants Lacitis, Wilson and McCoy were done by each of them for and on behalf of their respective marital communities, if any, and plaintiffs seek relief from the named individual parties defendant and their marital communities, if any.

#### **IV. JURISDICTION**

All articles herein complained of were written by one or more of the named individual parties defendant and published and disseminated in Washington, Hawaii, Oregon, California, Alaska and elsewhere, for profit, by one or more of the corporate parties defendant. Such publication in all events occurred within, but was not limited to, the State of Washington. Both corporate parties defendant are licensed and authorized to do business in the State of Washington and are doing business in the State of Washington. Both corporate defendants, as daily newspapers of general circulation, distribute for profit, in King County, daily issues of their publication. All individual parties defendant are either residents of King County or were specifically aware that publication of their work would be disseminated for profit within King County.

The court has jurisdiction over subject matter and the parties to this action.

#### **V. SPECIFIC ARTICLES ALLEGED BY ONE OR MORE OF THE PLAINTIFFS TO BE DEFAMATORY AND CONSTITUTE AN INVASION OF PRIVACY**

Appendix A-1 through A-10 contains specific excerpts from articles written by one or more of the individual parties defendant, published and disseminated by one or more of the corporate defendants.

Representative excerpts from each of the articles are attached hereto as Appendix A-1 through A-10. The articles themselves and the excerpts included within Appendix A-1 through A-10 are by this reference incorporated herein as



though wholly set forth. The defamations and invasions of privacy alleged herein include, but are not limited to these articles. Plaintiffs reserve the right to amend their complaint as discovery proceeds. The title, date of publication, name of publication, and author of known articles are as follows:

1. *Spiritualist's Life Rich in Earthly Rewards*, April 15, 1973 (front page), Seattle Times, John Wilson.
2. *Church and Personal Funds "Kept Separate"*, April 15, 1973, Seattle Times, John Wilson.
3. *The Medium . . . and His Message*, April 15, 1973, Seattle Times, John Wilson.
4. *"Psychic Powers": Proven? Or Are They "Ripoff"?*, April 15, 1973, Seattle Times, John Wilson.
5. *The Medium "Henry" Speaks at Aquarian Seance*, April 16, 1973, Seattle Times, John Wilson.
6. *Strange Acquaintance With the Aquarians*, March 16, 1978, Seattle Times, Erik Lacitis.
7. *Modern Miracle? Keith Rhinehart Wowed 'Em in Walla Walla*, March 17, 1978, Seattle Times, Erik Lacitis.
8. *The Continuing Saga Of Keith Rhinehart*, April 22, 1978, Seattle Times, Erik Lacitis.
9. *It Was An Incredible Scene for the "Hulk"*, November 5, 1979, Seattle Times, Erik Lacitis.
10. *It Was An Incredible Scene for the "Hulk"*, November 5, 1979, Seattle Times (edition distributed to outlying districts or a later edition of the same paper), Erik Lacitis.
11. *Wo?Man, Mystic, or Charlatan?*, February 17, 1978, Walla Walla Union-Bulletin, John McCoy.

#### IV. REPUBLICATION OF LIBEL

The article written by Erik Lacitis, published by the defendant the Seattle Times Company in the Seattle Times on

March 16, 1978 referred specifically to the series of Seattle Times stories regarding Keith Milton Rhinehart and the Aquarian Foundation written by defendant John Wilson and published by the Seattle Times Company in 1973. Defendant Erik Lacitis quoted directly from the front page, Sunday, April 15, 1973, article written by John Wilson. The explicit reference in the 1978 publication to the 1973 series of articles republished those articles; the 1973 articles and 1978 articles which refer thereto constitute a continued and continuous publication of the libel therein with respect to Keith Milton Rhinehart and the Aquarian Foundation.

## VII. DEFAMATION OF PARTIES PLAINTIFF

### A. Defamation Of Plaintiffs Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin, Ilse Taylor and Other Women Members of The Aquarian Foundation

#### 1. By The Seattle Erik Lacitis and John Wilson.

Plaintiffs Lillian Young, Kathi Bailey, and Toni Strauch are members of the Aquarian Foundation, and all are married women. Lillian Young is the mother of four children, and Toni Strauch also has children. Sylvia Corwin and Ilse Taylor are also members of the Aquarian Foundation. All were members of the Aquarian Foundation on March 17, 1978. All appear as plaintiffs and as representatives of all women members of the Aquarian Foundation, which women members range in age from teenagers to octagenarians, who have suffered injury to their good names, fame and reputation, extreme embarrassment, humiliation, shame, disgrace, and have been held up to public scorn, hatred and ridicule by the publication by defendants Seattle Times on March 17, 1978, of an article entitled *Modern Miracle? Keith Rhinehart Wowed 'Em in Walla Walla*, written by defendant Erik Lacitis, wherein it was recited that:

"As a chorus line of girls shed their gowns and bikinis and sang 'Sodomy' from the musical 'Hair,' Rhinehart pranced about the stage in a bikini and flowing yellow locks."

"Other Aquarians unpacked boxes of flower leis and flung them to the audience."

Said publication was intended to convey, and was taken by the community at large to mean, women members of the Aquarian Foundation such as Lillian Young, Kathi Bailey, Toni Strauch and others stripped off all their clothes and wantonly danced naked, exposing their genitalia in front of 1,100 male prisoners in the Walla Walla penitentiary, while singing a song extolling the virtue of homosexual intercourse.

In truth and fact, the women were not a chorus line—they did not dance. They were not wearing gowns—they were part of a church choir and were formally attired in church choir robes. In a subsequent part of the special presentation the women members of the choir did wear bikinis—which were at no time removed. While music was performed from the Broadway musical "Hair", Keith Milton Rhinehart was not prancing about the stage—he was not on the stage.

## **2. By The Walla Walla Union Bulletin and John McCoy.**

Plaintiffs Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin, and other women members of the Aquarian Foundation have suffered injury to their good names, fame and reputations, extreme embarrassment, humiliation, shame and disgrace, and have been held up to public scorn, hatred and ridicule by the February 17, 1978 publication by John McCoy and the Walla Walla Union-Bulletin of the article set out in Article V above.

The article, which included pictures, defamed the Aquarian Foundation and its leader, Keith Milton Rhinehart, as more specifically alleged hereinbelow. The article and pictures, by giving publicity to the membership and participation of Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin, and other unnamed but pictured women in the Aquarian Foundation church in an article defamatory of the Foundation and its ecclesiastic leader, thereby defamed all of the women individually.

## **B. Defamation Of Plaintiff Keith Milton Rhinehart.**

In writing, publishing and circulating the publications described in Article V above, in the selection of the "psychologically loaded" words used, and in the conscious juxtaposing of oft-repeated inflammatory information and allegations, defendants intended to convey, and did convey to the community at large, the impression that:

1. Keith Milton Rhinehart is a Jim Jones Guyana-like leader of "a bizarre Seattle cult."
2. The Aquarian Foundation is "Rhinehart's cult."
3. That Aquarian members do, and Keith Rhinehart demands that: "... his followers, worship a man ..." (Rhinehart), rather than God.
4. Keith Milton Rhinehart "play[s] at spiritualism."
5. Spiritual phenomenon exhibited by Keith Milton Rhinehart are consciously perpetrated frauds and "sleights-of-hand."
6. The "God-given psychic powers" of Keith Milton Rhinehart and the "seances" he conducts are a "rip off."
7. Lou Ferrigno, star of the television series "Incredible Hulk", who represents to millions of people a symbol of raw power directed solely toward helping others and triumphing over evil, so feared Keith Milton Rhinehart that Mr. Ferrigno had his father train "a gun on him (Rhinehart)" to be ready to "[blow] the guy's head off."
8. Keith Milton Rhinehart dresses as often as a woman as he does as a man.
9. Keith Milton Rhinehart personally and as part of a conscious "rip-off" hawks "dime store jewelry" as "apported stones for hundreds, sometimes thousands of dollars."
10. Keith Milton Rhinehart buys followers and supporters by "promis[ing] them cash prizes and

gifts such as pool tables, portable saunas, exercycles, trampolines, tape recorders, radios, and even a \$2,000 sex-change operation."

11. Keith Milton Rhinehart used Foundation money or contributions to buy lawyers to manipulate his early release from the sentence he was serving on a sodomy conviction.

12. Keith Milton Rhinehart willingly and voluntarily gave up his privacy and revealed a breast augmentation surgery to a prison guard in the Walla Walla State Penitentiary.

13. A sodomy conviction of Keith Milton Rhinehart still stands.

14. The sodomy conviction of Keith Milton Rhinehart was overturned by a federal district court on some mere technicality proffered by high-priced attorneys during a "long and expensive legal battle."

15. "One old woman willed [Rhinehart] a \$261,000 estate."

16. Keith Milton Rhinehart is unfit to be a religious leader.

The defamatory matters, communicated as aforesaid, did and were calculated to hold plaintiff Keith Milton Rhinehart up to public scorn, hatred and ridicule, and to impeach his honesty, integrity, virtue, religious philosophy, reputation as a person and in his profession as a spiritual leader.

### **C. Defamation Of Plaintiff Aquarian Foundation.**

In writing, publishing and circulating the publications described in Article V above, in the selection of the "psychologically loaded" words used, and in the conscious juxtaposing of oft-repeated inflammatory information and allegations, defendants intended to convey, and were understood to mean by the community at large, the impression that:

1. The Aquarian Foundation is a Jim Jones, Guyana-like "bizarre Seattle cult" which is the alter ego of Keith Milton Rhinehart, "cult leader."



2. Through the efforts of Keith Milton Rhinehart, who took the case to court, the Aquarian Foundation "escaped paying taxes" and thus has shirked responsibilities owed by citizens to the United States.

3. The main emphasis in the Aquarian Foundation religion is on homosexuality.

4. The Aquarian Foundation uses wealth to buy religious converts.

5. The Aquarian Foundation customarily uses a, "sales formula" devised by Keith Milton Rhinehart which combines sex, show biz, a seance," and money, and "call[s] it religion" to gain followers.

6. There is no segregation of money or contributions between the Aquarian Foundation and Keith Milton Rhinehart.

7. The Aquarian Foundation amasses wealth by selling fraudulently-produced stones for thousands of dollars.

Plaintiff the Aquarian Foundation is a corporation, not for profit, which depends upon financial support primarily from its membership, which is open to the public. The matters published by defendants tend to interfere with its activities by prejudicing it in public estimation. Such communications tend to disparage the religious corporation and the conduct of its activities and thus to obstruct the accomplishments of its corporate purposes. In addition, the articles have, or may have had, the effect of discouraging contributions by the membership and public and thereby diminished the financial ability of the Foundation to pursue its corporate purposes.

The defamation on the Foundation's ecclesiastic leader, in and of itself, constitutes a defamation of the Foundation.

## VIII. FALSITY OF ALLEGATIONS AND INNUENDOS

The articles and innuendos therein printed, published and circulated by defendants as set out above, of and concerning

women members of the Aquarian Foundation, Keith Milton Rhinehart, and the Aquarian Foundation were fictional and untrue. Defendants knew, or in the exercise of reasonable care should have known, that the publications were false or would create materially-false impressions. The publications were made by defendants with actual malice and willful intent to injure plaintiffs and their reputations in the community, in their businesses and professions, and to cause great emotional distress. Defendants failed to make reasonable inquiries and were grossly negligent in such failure to inquire into the truth of the facts so published concerning plaintiffs. The falsity of the above-described articles would have been disclosed to defendants had defendants made proper or reasonable inquiry concerning the facts published. The articles were printed, published and circulated by defendants with such reckless and wanton disregard and carelessness as to their truth or falsity as to indicate an utter disregard of the rights of plaintiffs.

As a direct result of the defendants' actions in maliciously, negligently and inexcusably exposing plaintiffs Lillian Young, Kathi Bailey, Toni Strauch, Ilse Taylor, Sylvia Corwin, and other women members of the Aquarian Foundation to public hatred, contempt and ridicule, said plaintiffs suffered substantial and great injury and damage, including but not limited to, great embarrassment and humiliation, acute nervousness and mental anguish, and injury to their good names, fame and reputations.

As a direct result of defendants' actions in maliciously, negligently and inexcusably exposing Keith Milton Rhinehart, the Aquarian Foundation and thereby its members to public hatred, contempt and ridicule, Keith Milton Rhinehart suffered and continues to suffer great emotional distress, has feared to return to his home in Seattle, Washington for the last two years, and has been greatly embarrassed and humiliated concerning his body. Because of threats received to his life, he has been required at great expense to install security systems in his residence, and out of fear for his physical safety has been forced to live elsewhere at great expense. His health has been affected and he has suffered and continues to suffer from acute nervous-

ness, mental anguish, and bodily pain. His good name and reputation have been injured and said publications had, and still have, a tendency to injure plaintiff in his occupation as a religious leader.

As a direct result of defendants' actions in maliciously, negligently and inexcusably exposing the Aquarian Foundation to public hatred, contempt and ridicule, the Aquarian Foundation suffered substantial and great injury and damage, including but not limited to, prejudicing and disparaging the religious foundation in the public estimation, thereby obstructing the accomplishments of its purposes and causing it financial damage in an amount to be proved at trial by preventing it from obtaining donations, and by causing extra cost to relocate Keith Milton Rhinehart and his assistants.

## **IX. INVASION OF PRIVACY**

### **A. Defendants' Invasion of Keith Milton Rhinehart's Right Of Privacy.**

By writing, printing, publishing and circulating, and selling for profit, the articles as set out above, of and concerning Keith Milton Rhinehart, including pictures taken of him, defendants invaded Keith Milton Rhinehart's right of privacy.

#### **1. Unreasonable Intrusion Upon Seclusion.**

Defendants John McCoy and the Walla Walla Union-Bulletin, Inc. unreasonably intruded upon the seclusion of Keith Milton Rhinehart in 1978 by attending, or sending staff to attend, uninvited, the private religious presentation delivered at the Walla Walla State Penitentiary, by taking unauthorized pictures, and further by giving publicity to the events which occurred and pictures taken, in order to thereby profit. Defendants intruded upon some matters not exhibited to public gaze about the plaintiff, including the private fact that he had undergone breast augmentation surgery, and further gave publicity to that private fact.

#### **2. Unreasonable Publicity Given to Private Facts.**

Defendants John McCoy, the Walla Walla Union-Bulletin, Inc., the Seattle Times Company, John Wilson, and Erik

Lacitis, invaded Keith Milton Rhinehart's right of privacy by giving publicity to matters concerning the private life of Keith Milton Rhinehart, which are not of legitimate concern to the public and the publication of which would be highly offensive to a reasonable person. Without in any way limiting the matters wrongfully given publicity, plaintiff Keith Milton Rhinehart alleges that his privacy was invaded by: (1) the publication and revelation of the fact of his breast augmentation surgery, by such comments as, "Rhinehart, who shares the anatomy of both sexes", (2) by constant republication of a conviction for sodomy without clarifying that that conviction was vacated; because obtained through the knowing use of perjured testimony, and upon the basis of newly-discovered evidence, and (3) by continued republication of and emphasis on the minor part of the religious program during which Keith Milton Rhinehart appeared costumed in women's clothing.

### **3. Publicity That Unreasonably Created False Light.**

Defendants the Walla Walla Union-Bulletin, John McCoy, the Seattle Times Company, John Wilson, and Erik Lacitis invaded the privacy of Keith Milton Rhinehart by giving publicity to matters concerning plaintiff which placed Keith Milton Rhinehart in a false light before the public in a manner which would be highly offensive to a reasonable person. Without limiting in any way the matters to which defendants wrongfully gave such publicity, defendants unreasonably placed Keith Milton Rhinehart in a false light before the public by publishing articles and pictures which created a materially-false impression that Rhinehart dresses as often as a woman as as a man, has no religious principle to illustrate thereby, and by constant republication of the sodomy conviction without explaining that it was vacated, and once without even incorrectly describing that it had been "overturned."

Defendants had knowledge or acted in reckless disregard as to the falsity of or the materially-false impression which would be created by the publicized matters, and the false light in which Keith Milton Rhinehart would be placed.

Defendants, by such invasion of Keith Milton Rhinehart's privacy, have harmed his interest in privacy, and caused and continue to cause him great mental distress.

**B. Defendants' Invasion Of The Rights Of Privacy Of Lillian Young, Kathi Bailey, And Other Women Members Of The Aquarian Foundation.**

By writing, printing, publishing and circulating the March 17, 1978 article set out in Article V above, of and concerning plaintiffs, defendants Erik Lacitis and the Seattle Times Company invaded the rights of privacy of Lillian Young, Kathi Bailey, Toni Strauch, Ilse Taylor, Sylvia Corwin, and other women who were members of the Aquarian Foundation in 1978.

**1. Unreasonable Intrusion Upon Seclusion.**

Defendants John McCoy and the Walla Walla Union-Bulletin, Inc. unreasonably intruded upon the seclusion of Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin, and other women members of the Aquarian Foundation in 1978 by attending, or sending staff to attend, uninvited, the private religious services performed at the Walla Walla State Penitentiary, by taking unauthorized pictures, by giving publicity to the events which occurred and pictures taken, and by selling for profit the publications and pictures.

**2. Publicity That Unreasonably Created False Light.**

Defendants Erik Lacitis and the Seattle Times invaded the privacy of Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin, Ilse Taylor, and other women members of the Aquarian Foundation by giving publicity to matters which unreasonably placed plaintiffs in a false light before the public in a manner which would be highly offensive to a reasonable person. Defendants created the materially-false impression that plaintiffs stripped off all their clothes and wantonly danced naked exposing their genitalia in front of 1,100 male inmates. Defendants had knowledge of or acted in reckless disregard as



to the falsity of the publicized matter and the false light in which plaintiffs would be placed.

Defendants, by such invasion of privacy, have harmed Lillian Young, Kathi Bailey, Toni Strauch, Sylvia Corwin, Ilse Taylor, and other women members of the Aquarian Foundation in their interest in privacy, and caused and continued to cause them great mental distress.

### C. Falsity, Sensationalism And Intent Of Articles.

The articles and pictures were written, published and circulated, and their entire content and tone was created in a sensationalist manner calculated to sell papers and make a profit by arousing public interest and inflaming the readers' senses. Defendants intended to profit by exploiting private facts and false impressions, and by heralding sex, religion, fraud, money and extravagant gifts, unusual psychic powers, and homosexuality. The articles, including grabby headlines such as *Wo?Man, Mystic, Or Charlatan?* were designed for the sole purpose of creating reader interest for the aggrandizement of the papers, to the total disregard and disrespect of plaintiffs' rights and interests in privacy.

## X. PRAYER FOR RELIEF

WHEREFORE, come now the plaintiffs and for relief against defendants and each of them, jointly and severally, pray:

1. Against the Seattle Times Company, John Wilson, Erik Lacitis and their marital communities:

(a) With respect to this defamation action, Keith Milton Rhinehart prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$1,000,000.

(b) With respect to his action for invasion of privacy, Keith Milton Rhinehart prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$1,000,000.

(c) With respect to its action for defamation, the Aquarian Foundation prays for damages in an amount to

be proved at trial, but believed to be, and therefore alleged to be, not less than \$260,000.

(d) With respect to her action for defamation, plaintiff Lillian Young prays for damages for pain and suffering, humiliation and mental anguish in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$500,000, and for punitive damages pursuant to Hawaii State law of an additional \$500,000.

(e) With respect to her action for invasion of privacy, Lillian Young prays for damages in the amount be proved at time at trial, but believe to be, and therefore alleged to be not less than \$500,000, and for punitive damages pursuant to Hawaii State law of an additional \$500,000.

(f) With respect to her defamation action, plaintiff Kathi Bailey prays for damages in an amount to be proved at time of trial, but believe to be, and therefore alleged to be, not less than \$500,000.

(g) With respect to her action for invasion of privacy, Kathi Bailey prays for damages in an amount to be proved at time of trial, but believed to be and therefore alleged to be, not less than \$200,000.

(h) With respect to her action for defamation, plaintiff Toni Strauch prays for damages for pain and suffering, humiliation and mental anguish in an amount to be made definite at time of trial, but believed to be and therefore alleged to be, not less than \$500,000, and for punitive damages pursuant to Hawaii State law of an additional \$500,000.

(i) With respect to her action for invasion of privacy, Toni Strauch prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$500,000, and for punitive damages pursuant to Hawaii State law of an additional \$500,000.

(j) With respect to her action for defamation, plaintiff Sylvia Corwin prays for damages for pain and suffer-

ing, humiliation and mental anguish in an amount to be made definite at time of trial, but believed to be and therefore alleged to be, not less than \$500,000.

(k) With respect to her action for invasion of privacy, plaintiff Sylvia Corwin prays for damages in an amount to be proved at time of trial but believed to be, and therefore alleged to be, not less than \$500,000.

(l) With respect to her action for defamation, plaintiff Ilse Taylor prays for damages for pain, suffering, humiliation and mental anguish in an amount to be made definite at time of trial, but believed to be and therefore alleged to be, not less than \$500,000.

(m) With respect to her action for invasion of privacy, Ilse Taylor prays for damages in an amount to be proved at time of trial but believed to be, and therefore alleged to be, not less than \$500,000.

2. Against defendants Walla Walla Union-Bulletin, Inc., John McCoy, and his marital community:

(a) With respect to his defamation cause of action, Keith Milton Rhinehart prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$1,000,000.

(b) With respect to his action for invasion of privacy, Keith Milton Rhinehart prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$1,000,000.

(c) With respect to its action for defamation, the Aquarian Foundation prays for damages in an amount to be proved at time of trial, but believed to be and therefore alleged to be, not less than \$500,000.

(d) With respect to her action for defamation, plaintiff Lillian Young prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000, and for punitive damages pursuant to Hawaii State law of an additional \$200,000.

(e) With respect to her action for invasion of privacy, plaintiff Lillian Young prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000, and for punitive damages pursuant to Hawaii State law of an additional \$200,000.

(f) With respect to her defamation action, plaintiff Kathi Bailey prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000.

(d) With respect to her action for invasion of privacy, Kathi Bailey prays for damages in an amount to be proved at time of trial, but believed to be and therefore alleged to be, not less than \$60,000.

(h) With respect to her action for defamation, plaintiff Toni Strauch prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000, and for punitive damages pursuant to Hawaii State law of an additional \$200,000.

(i) With respect to her action for invasion of privacy, plaintiff Toni Strauch prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000, and for punitive damages pursuant to Hawaii State law of an additional \$200,000.

(j) With respect to her action for defamation, plaintiff Ilse Taylor prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000.

(k) With respect to her action for invasion of privacy, plaintiff Ilse Taylor prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000.

(l) With respect to her defamation action, plaintiff Sylvia Corwin prays for damages in an amount to be

proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000.

(m) With respect to her action for invasion of privacy, plaintiff Sylvia Corwin prays for damages in an amount to be proved at time of trial, but believed to be, and therefore alleged to be, not less than \$200,000.

3. As against all defendants, on behalf of all plaintiffs, for attorneys' fees, costs of suit, and for such further and other relief as to the court may seem just.

DATED this 15th day of February, 1980.

GODDARD AND WETHERALL

By /s/ LINDA E. COLLIER

Linda E. Collier

By /s/ JACK E. WETHERALL

Jack E. Wetherall

STATE OF U.S. VIRGIN ISLANDS  
COUNTY OF ST. THOMAS—ST. JOHN

} ss

KEITH MILTON RHINEHART, being first duly sworn on oath, deposes and states:

That I am one of the plaintiffs in the above-captioned cause. I have read the within and foregoing COMPLAINT FOR DEFAMATION AND INVASION OF PRIVACY, know the contents thereof, and believe the same to be true.

/s/ KEITH MILTON RHINEHART

Keith Milton Rhinehart

(Jurat omitted in printing.)



STATE OF WASHINGTON }  
COUNTY OF KING } ss

William K. Erickson, being first duly sworn on oath,  
deposes and states:

That I am the Corporate Secretary of the Aquarian  
Foundation, one of the plaintiffs in the above-captioned cause.  
I have read the within and foregoing COMPLAINT FOR  
DEFAMATION AND INVASION OF PRIVACY, know the  
contents thereof, and believe the same to be true.

/s/ WILLIAM K. ERICKSON

William K. Erickson

(Jurat omitted in printing.)

## APPENDIX A

**A-1: *Spiritualist's Life Rich in Earthly Rewards*, April 15, 1973 (front page, Sunday Edition), Seattle Times, John Wilson:**

"Whatever else there is—or isn't—in Keith Milton Rhinehart's life as a Seattle spiritualist, there is unquestionably money. A lot of it.

"Money for expensive automobiles, gifts, travels, investment, and attorneys' fees.

"Money from seances.

"Money from the sale of 'precious stones, blessed by the masters, which had been apported' (produced) from Rhinehart's body.

"Money from an 85-year-old woman who willed Rhinehart's church her \$261,000 estate.

"There is controversy, too. A lot of it.

"Controversy from a police raid 18 years ago in Denver, resulting in conviction for Rhinehart and police account of how the seance actually worked.

"Controversy at a seance last year at a Canadian college when a near-riot broke out after a student hidden backstage said it was all 'a rip off.'

"Controversy over the basic belief of Rhinehart's church, that he can commune with the spirit world.

"Out of it all, Rhinehart seems to emerge no worse for wear, still driving his \$10,000 automobile, still—in his own words—making more money than most mediums. Still convincing people of his special 'god-given psychic powers.'

"Still controversial. Still the money comes in."

**A-2: *Church and Personal Funds Kept "Separate"*, April 15, 1973, Seattle Times, John Wilson:**

"In 1969, Rhinehart won the court case and the Foundation escaped paying taxes on the estate.

...

"Rhinehart said the church had about 1,000 members in the Seattle area, but it declined when he served 2½ years in prison on a sodomy conviction that was later overturned in federal court."

A-3: *The Medium . . . and His Message*, April 15, 1973, Seattle Times, John Wilson:

"Keith Milton Rhinehart's long, wavy hair hangs below his shoulders. In private he smokes, wears an expensive leather jacket and pegged, black denim pants.

"Mrs. Gostas said Rhinehart would visit her son, George, and both boys 'would play at spiritualism.' 'He was driving a big car—a Cadillac or something—and the other kids were still walking.'

"AFTER HIGH SCHOOL Rhinehart was doing more than playing at holding seances, for seances supplied the money to pay for the expensive automobile.

" 'I met a homosexual teacher, and he took me to some of the homosexual places in Seattle,' Rhinehart said.

"This visit was later to play a big part in Rhinehart's decision to found a church here.

" . . . he said he decided to operate out of Seattle for several reasons.

"Added to Seattle's liberal treatment of homosexuals was the fact that the state took no action against activities by mediums.

"AS A 21ST BIRTHDAY present the church gave its young medium his first trip around the world.

" . . . In 1965, Rhinehart was arrested and charged with sodomy involving a 16-year-old boy. He was convicted and served 2½ years in state prison but a long and expensive legal battle resulted in the conviction being overturned in federal court.

"United States District Judge William P. Gray said the sodomy conviction was 'based on testimony of extremely doubtful credibility.' . . .

"O'Connor said he carried thousands of dollars back to Seattle for Rhinehart, carrying the money in a bank bag stuck in the waist of his pants.

"O'Conner said he did not know this source of all the money but he recalled that one woman, about 70, said she had paid \$10,000 for a stone.

"THE STONE 'blessed by the masters,' supposedly had been sent by the spirits and expelled from Rhinehart's body."

A-4: "*Henry*" *Speaks at Aquarian Seance*, April 16, 1973, Seattle Times, John Wilson:

"It was convincing. Several women cried. Rhinehart, or the 'voice', seemed to know uncanny things about what had happened in their lives.

"But it was impossible to judge, without knowing whom he was talking about and whom he was talking to.

"It was the performance that was convincing.

". . . Rhinehart led the singing of another song and called for a 'sharing of consciousness.'

"In the old-famous term it was collection time."

A-5: *Strange Acquaintance With Aquarians*, March 16, 1978, Seattle Times, Erik Lacitis:

"I have been working on this story for a week, and every time I think this can't get any wierder, it gets wierder.

"In the course of researching it, I've been shown a white robe stained with what is supposed to be the blood of Jesus Christ.

"I have watched a video tape of a mystic who spews out 'gems' from his mouth that he says have been spontaneously created.

"I have looked at photos of an incredible day-long vaudeville that shows this same mystic—who sometimes dresses like a man, sometimes like a woman—put on last month at the penitentiary at Walla Walla. To get 1,100 of the prison's 1,600 inmates to attend the show, the mystic gave away \$35,000 in cash, pool tables, television sets and other prizes, including a \$2,000 sex-change operation.

"The story centers on the Rev. Keith Milton Rhinehart, 42, spiritual leader of the Aquarian Foundation, based in Seattle.

"Rhinehart does not like to talk to the press, especially after a Times series of articles about him in 1973.

"'Whatever else there is—or isn't—in Keith Milton Rhinehart's life as a Seattle spiritualist, there is unquestionably money. A lot of it,' the series began.

"'Money for expensive automobiles, travels, investments and attorneys' fees. Money from seances. Money from the sale of precious stones blessed by the masters . . .

"'Money from an 85-year-old woman who willed Rhinehart's church her \$261,000 estate. There is controversy, too. Controversy from a police raid 18 years ago in Denver (on charges of obtaining money at a seance under false pretense, fortune-telling and operating a confidence game) resulting in conviction for Rhinehart.'

"... In 1973, Rhinehart said the group's membership once as 1,000 in Seattle, but declined after he spent 2½ years in prison on a sodomy conviction that later was overturned in federal court.



"The moment you walk into the old home, you are surrounded by displays of objects labeled as 'apported' (produced) from Rhinehart's body. Most of it looks like dime-store jewelry."

A-6: *Modern Miracle? Keith Rhinehart Wowed 'Em in Walla Walla*, March 17, 1978, Seattle Times, Erik Lacitis:

"The Aquarian Foundation church is like no church I've ever seen. Last Sunday in front, where the altar is supposed to be, there was a huge TV screen.

"... One way that Rhinehart gains converts is by what he says of his ability to spontaneously shed 'precious stones' from his body. If that's true, it'd be nothing less than a miracle.

...

"On that date, Keith Rhinehart held an incredible six-hour-long show for the inmates in which he gave away \$35,000 in merchandise and money, and presented vaudeville acts ranging from a 76-year-old woman saxophone player, to hula dancers, to a chorus line of girls wearing bikinis.

"Rhinehart said all he wanted to do was help the convicts become better persons. Perhaps that was the case. The inmates certainly didn't have much money they could give Rhinehart, as have some of his followers in Seattle.

"Or, perhaps it was Keith Rhinehart's peculiar way of staging a triumphful return to the prison, where he served 2½ years on a morals charge involving a male youth, a conviction later overturned in federal court.

"At any rate, Rhinehart, his long-bleach-blond hair flowing past his shoulders, got 1,100 of the 1,600 inmates at the prison to attend his show with a simple gimmick. He promised them cash prizes and gifts such as pool tables, portable saunas, exercycles, trampolines, tape recorders, radios, and even a \$2,000 sex-change operation.

...

"To qualify for them [prizes], the convicts had to listen to the Aquarian Foundation message: . . .

"... This time, he was wearing a white, sequined dress, and a long, brown wig. He swished as he walked.

...

"'As a chorus line of girls shed their gowns and bikinis and sang "Sodomy" from the musical "Hair", Rhinehart pranced about the stage in a bikini and flowing yellow locks.'

"All I see are these people, his followers, worshipping a man once convicted of operating a confidence game.

"I'd rather be playing pinball. All I'll lose there is 25 cents."

A-7: *The Continuing Saga of Keith Rhinehart*, April 22, 1978, Seattle Times, Erik Lacitis:

"The saga of Keith Milton Rhinehart, the bizarre Seattle mystic about whom I wrote last month, continues.

...

"Rhinehart, 42, once convicted of obtaining money at a Denver seance under false pretense, fortune-telling and operating a confidence game, started the foundation in 1955. He claims he can 'apport' (produce) gems and other objects that have special mystical powers from his body.

"Rhinehart, who sometimes dresses like a woman, sometimes like a man, also claims he has 'apported' a robe stained with Jesus Christ's blood. He has hundreds of followers who believe he can perform such miracles, and have donated thousands of dollars to his organization. One old woman willed him a \$261,000 estate.

...

"Rhinehart said all he wanted to do was help convicts become better persons. But perhaps the show was his way of stating a triumphful return to the prison, where he once served time on a morals conviction.

...

"I then told McIntyre of the letters and phone calls I had received from former members of the foundation, who told me they had been urged to buy 'apported' stones for hundreds, sometimes thousands of dollars."

A-8: *It Was an Incredible Scene for the "Hulk"*, November 5, 1979, Seattle Times, Erik Lacitis:

"How did Lou Ferrigno, TV's Incredible Hulk, become involved with the bizarre Seattle Cult headed by Keith Milton Rhinehart?

"Rhinehart, who also uses the name 'Master Kumara', bills himself as 'the most incredible and unique guru on the planet.' He is quite a strange person. He sometimes dresses like a woman, sometimes like a man. He claims he can produce gems and other objects—including objects two or three feet in height—from his eyes, mouth, sides, thighs, and skin.

...

"This past weekend, I contacted Ferrigno by phone in Los Angeles. I explained to him my interest in Rhinehart's cult, about which I wrote several columns last year. To summarize:

"Rhinehart, now 43, was convicted in 1954 of obtaining money at a Denver seance under false pretenses, fortune-telling and operating a confidence game. He was 18 then. A year later, he started the Aquarian Foundation. . . . Rhinehart does not like the press. Last year, crying and yelling into the phone, he told me . . .

"Ferrigno said he found it hard to believe some of Rhinehart's claims. He was asked if he didn't think that consenting to be Rhinehart's bodyguard gave the appearance he endorsed the cult leader.

" 'No way am I involved,' Ferrigno said. 'It was like I told him (Rhinehart), if you every say I'm a member, I'll sue you.' "

A-9: *It Was An Incredible Scene for the "Hulk"*, November 5, 1979, Seattle Times (edition distributed to outlying districts or a later edition of the same paper), Erik Lacitis:

"Ferrigno said his family attended the event. He said he was especially glad his father was there.

" 'You know that he's a lieutenant in the police department, and he had a gun on him (Rhinehart). If anything had happened to me, he'd have blown the guy's head off,' Ferrigno said."

A-10: *Wo?man, Mystic, or Charlatan?*, February 17, 1978, Walla Walla Union-Bulletin, John McCoy:

"Combine sex, show biz, a seance, \$50,000 in gifts and prize money, call it religion and you bet it will sell.

"That's the sales formula the Rev. Keith Milton Rhinehart, founder and guru of a Seattle-based spiritualist religion called the Aquarian Foundation brought to a packed auditorium of 1,100 inmates at the Washington State Penitentiary last Sunday.

"Rhinehart assembled a vaudeville extravaganza featuring singers, hired hula dancers, Samona fire-eaters, a 76-year old granny tooting a mean saxophone and a bikini-clad chorus line of shapely young ladies.

"The 'Master Kumara' himself claimed to flash back to previous lives, communicate with the dead and pull gems from his ears, cheeks, neck and eyes. He wore nearly a dozen outfits ranging from a metallic silver jumpsuit to a fur-fringed mini skirt to a gold

bikini bottom and silver pasties. To season the pudding, Rhinehart dispensed certificates he claimed were good for a total of \$50,000 in money and merchandise like tape-recorders, televisions and pool tables. (One was a \$2,000 grant for a sex-change operation.)

"All in the name of religion.

"For the 41-year-old medium it was a triumphful return to the penitentiary and a grand opportunity to proselytize a captive audience. With the exception of one earlier visit, the last time Rhinehart was inside the walls he did a two-and-a-half-year stint on a sodomy conviction. That sentence was 'vacated' or wiped clean, and Rhinehart was released in 1969.

"Despite his early release and a 'clean slate,' Rhinehart's imprisonment put a crimp on what had swelled to be a 1,000-member spiritualist church.

...

"He told another inmate, 'you're going to see the person you once loved in California.' And again, a cash sweetener.

...

"Asked if he thought the crowd was 'buying it' one penitentiary guard replied, 'I don't think the majority are that dumb.'

...

"Rhinehart rewarded the threesome by presenting them their choice of the largest of the following 'golden stones.'

"Trick or no trick, Rhinehart's popping gems were his final proof in the culmination of the show. Now it was time to entertain.

"In rapid succession, he appeared in a white sequined dress with a long red-haired wig, then a snug, silver dress slit up the side with a touseled wig and then a



green and white gown with a white turban and a paste-on black beard.

"So much for religion, this was show biz and sex.

"... Backstage, Rhinehart, who shares the anatomy of both sexes (he told one prison guard he only went half way with his sex-change operation), talked about sex.

"... Consequently, Rhinehart admits to being neither male nor female and looks like both.

"If there are questions about Rhinehart's sex, there are also questions about his money.

"... Penitentiary officials did receive 102 tape recorders to disburse and assumed inmate accounts would be credited the \$50, and \$100, even \$1,000 grants Rhinehart awarded.

"Where did it all come from?

"Newspaper accounts record that the Aquarian Foundation received a \$261,000 estate in 1967 and laid claim to another \$200,000 estate the same year. Other than that, the record is bare. When asked, Aquarians shrug their shoulders and chalk it up to 'little old ladies'."

"A Seattle police spokesman said Aquarian fund raising appeared to be above board and 'there is no on-going investigation concerning them.'

"But wherever it came from, Rhinehart blew a wad last Sunday."

**APPENDIX B**

IN THE

**SUPERIOR COURT OF THE STATE OF WASHINGTON**

FOR KING COUNTY

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**No. 80-2-01460-4**

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KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

*Defendants.*

**AMENDED COMPLAINT**

COME NOW the plaintiffs and amend pursuant to CR 15(a) the Complaint filed herein on February 15, 1980, in the following particulars:

1. Pages 3 through 20 and Appendix A are realleged, reserved and affirmed in their entirety.
2. The caption is amended to correct a scrivener's error to delete the name "Rebecca Karen Wilson" and add in its stead "Jane Doe Wilson".
3. Article III, paragraph (b), line 27 on page 2 of the Complaint is amended to correct a scrivener's error to delete

"Rebecca Wilson, his wife," and add "Jane Doe Wilson, his wife, if any".

DATED this 9th day of April, 1980.

GOODARD AND WETHERALL

By /s/ LINDA E. COLLIER

*Attorneys for Plaintiffs*

Linda E. Collier

**APPENDIX C**  
**IN THE**  
**SUPERIOR COURT OF THE STATE OF WASHINGTON**  
**FOR KING COUNTY**

---

**No. 80-2-01460-4**

---

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY

*Defendants.*

**ANSWER OF DEFENDANTS THE SEATTLE TIMES  
COMPANY, WALLA WALLA UNION BULLETIN, ERIK  
LACITIS AND JOHN MCCOY**

Defendants (except for the Wilsons) answer plaintiffs' Complaint for Defamation and Invasion of Privacy as follows:

1. With respect to the allegations contained in paragraph I(a), defendants allege plaintiff Keith Milton Rhinehart is a public figure, not a private figure, and these defendants are without information or knowledge sufficient to form a belief as to the remainder of the allegations contained in paragraph I(a) and therefore deny the same.

2. With respect to the allegations contained in paragraph I(b), defendants are without knowledge or information

sufficient to form a belief as to the truth or falsity thereof and therefore deny the same.

3. With respect to the allegations contained in paragraph I(c), defendants are without knowledge or information sufficient to form a belief as to the truth or falsity thereof and therefore deny the same.

4. With respect to the allegations contained in paragraph II(a)-(c), defendants admit the same.

5. With respect to the allegations contained in paragraph III(a), defendants admit that Erik Lacitis is employed as a columnist for the Seattle Times and that he and his wife are residents of the State of Washington.

6. With respect to the allegations contained in paragraph III(b), defendants admit that defendants John Wilson and his wife are residents of the State of Washington but deny that he is now employed as a writer for the Seattle Times.

7. With respect to the allegations contained in paragraph III(c), defendants admit that defendant John McCoy and Karen McCoy, his wife, are residents of the State of Washington, but deny that John McCoy is now a writer for the Walla Walla Union-Bulletin.

8. With respect to the allegations contained in paragraph IV, defendants admit the same.

9. With respect to the allegations contained in paragraph V, defendants specifically deny that the excerpts from the articles complained of attached to plaintiffs' complaint as Appendix A-1 through A-10 are representative of the articles complained of and specifically deny that any of the articles listed are defamatory or contain invasions of privacy. Defendants admit the remaining allegations contained in paragraph V.

10. With respect to the allegations contained in paragraph VI, defendants admit that the article written by Erik Lacitis and published by defendant Seattle Times Company in the Seattle Times on March 16, 1978 referred to the series of Seattle Times stories regarding plaintiff Rhinehart and the Aquarian Foundation written by John Wilson and published by the Seattle Times



in 1973, and that the article written by Lacitis quoted directly from the Sunday, April 15, 1973 article written by John Wilson. Defendants deny each and every other allegation contained in paragraph VI.

11. With respect to the allegations contained in paragraph VII(A)(1), defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations pertaining to the marital state of the named plaintiffs, their membership in the Aquarian Foundation, or their number of children, and therefore deny the same. With respect to the remaining allegations contained in paragraph VII(A)(1), defendants deny the same.

12. With respect to the allegations contained in paragraph VII(A)(2), defendants deny the same.

13. With respect to the allegations contained in paragraph VII(B), defendants deny the same.

14. With respect to the allegations contained in paragraph VII(C), defendants are without knowledge or information sufficient to form a belief as to whether or not plaintiff The Aquarian Foundation, is a not-for-profit corporation and therefore denies the same. Defendants deny each and every other allegation contained in paragraph VII(C).

15. With respect to the allegations contained in paragraph VIII, defendants deny the same.

16. With respect to the allegations contained in paragraph IX, defendants deny the same.

17. With respect to the prayer for relief contained in paragraph X, defendants deny that plaintiffs are entitled to any relief from defendants.

### AFFIRMATIVE DEFENSES

18. *Substantial Truth.* The articles complained of in plaintiffs' Complaint were and are substantially true and accurate.

19. *Constitutional Privilege.* Publication of the articles referred to in plaintiffs' Complaint was and is privileged and

protected from liability by the First and Fourteenth Amendments to the United States Constitution and by the Washington State Constitution.

20. *Public Figures—Lack of Actual Malice.* The articles complained of concern the conduct of “public figures” and were prepared and published without “actual malice” as that term has been defined and applied by the United States Supreme Court and the Washington Supreme Court.

21. *Not “of and Concerning” Plaintiffs.* With respect to the allegations of defamation by plaintiffs Bailey, Young, Strauch, Corwin, and Taylor, the articles complained of were not perceived by the public as “of and concerning” these plaintiffs.

22. *Statute of Limitations.* Plaintiffs’ claims of defamation and invasion of privacy arising out of the articles written in 1973 by John Wilson and published by the Seattle Times are barred by the statute of limitations applicable to libel.

23. *Newsworthy and Public Facts.* With respect to plaintiff Rhinehart’s claims of unreasonable publicity given to private facts, such facts were obtained in part from the public record and in any event were obvious to the public and therefore not private. In addition, such facts were newsworthy and matters of legitimate public interest and therefore privileged and protected by the First Amendment.

24. *Consent.* With respect to the allegations of invasion of plaintiffs’ privacy arising out of the publication of articles dealing with the presentation made by plaintiffs at the Walla Walla State Penitentiary in 1978, plaintiffs consented to the presence of defendant John McCoy, knowing that he was a newspaper reporter and that plaintiffs’ activities would likely be published in defendant newspapers.

25. *No Reasonable Expectation of Privacy.* Plaintiffs had no reasonable expectation of privacy when engaged in a six hour stage presentation before 1,000 inmates at the state prison.

26. *Publicity Not Highly Offensive.* The publicity given by defendants to matters concerning plaintiffs was not such as to

be highly offensive to a reasonable person so as to constitute placing them in a false light before the public.

27. *Action Barred by Religion Clauses of First Amendment.* To the extent the allegedly defamatory publications relate to the validity of plaintiffs' religious beliefs or practices, this action is barred by the free exercise and establishment clauses of the First Amendment to the United States Constitution.

28. *Accurate Reports of Judicial Proceedings.* To the extent plaintiffs' complaint refers to publications concerning plaintiff Rhinehart's criminal record, such publications are substantially accurate reports of judicial proceedings and as such are protected under the First and Fourteenth Amendments to the United States Constitution.

29. *No Damages.* Plaintiffs have suffered no damages as a result of defendants' alleged defamation and invasion of privacy.

WHEREFORE having fully answered plaintiffs' Complaint, defendant prays that said Complaint be dismissed with prejudice and that the defendants be awarded their costs and such other relief as the Court may deem just and appropriate.

DATED this 15th day of May, 1980.

DAVIS, WRIGHT, TODD, RIESE  
& JONES  
*Attorneys for Defendants*

By           /s/ EVAN L. SCHWAB            
Evan L. Schwab

By           /s/ ROBERT A. BLACKSTONE            
Robert A. Blackstone

## APPENDIX D

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

---

 No. 80-2-01460-4
 

---

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

*Defendants.*

**AFFIDAVIT OF JACK E. WETHERALL IN OPPOSITION  
TO MOTION TO COMPEL DISCOVERY**

STATE OF WASHINGTON }  
COUNTY OF KING } ss

JACK E. WETHERALL, being first duly sworn on oath, deposes and states:

1. That I am an attorney admitted to practice and in good standing within the State of Washington.
2. That I make this affidavit in opposition to the motion by counsel for the Seattle Times to compel the plaintiff Rhinehart to divulge the current address at which he is living.

3. That I have been the attorney for the Aquarian Foundation, of which the plaintiff Rhinehart is the minister, since approximately 1971.

4. That in my capacity as the Foundation's attorney, I have specific, personal and testimonial knowledge concerning a series of death threats directed to Keith Rhinehart.

5. That within the last two years, I have heard two or three tape recorded phone messages, left on the Aquarian Foundation's phone answering machine, which messages threatened physical harm and/or death to Rev. Rhinehart and/or one or more members of the Foundation. That the individual involved was an ex-felon, involved, according to the Federal Bureau of Investigation, in gun running and shooting incidents in the State of Alaska.

6. That upon advice from the Seattle Police Department and in conversations with special agents from the Federal Bureau of Investigation, it was determined that Rev. Rhinehart's location should be kept a closely-guarded secret.

7. That in my capacity as attorney for the Foundation and in my capacity as attorney for Rev. Rhinehart since approximately 1971, I have been and am personally aware that Rev. Rhinehart's permanent residence is located in the City of Seattle, that he is a resident of the State of Washington, and pays real estate and other taxes here in Washington, which is his permanent residence.

7. That I genuinely believe that divulging information concerning Rev. Rhinehart's actual living address while in Seattle for purposes of discovery, at the request of Evan Schwab, would constitute an extreme risk, and that the issuance of a protective order or other steps would not be adequate.



Further, I know of no relevant information which could be derived from the exact current living location of Rev. Rhinehart.

/s/ JACK E. WETHERALL

(Jurat omitted in printing.)

**APPENDIX E**  
**IN THE**  
**SUPERIOR COURT OF THE STATE OF WASHINGTON**

FOR KING COUNTY

No. 80-2-01460-4

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONY STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY

*Defendants.*

**AFFIDAVIT OF KEITH MILTON RHINEHART**

STATE OF WASHINGTON }  
COUNTY OF KING } ss

KEITH MILTON RHINEHART, being first duly sworn on oath, deposes and states:

1. That I am a party plaintiff in the above-entitled action. That I have been a minister with the Aquarian Foundation in excess of 20 years.

2. Since the writing and publishing of numerous articles the subject matter of this cause of action, the staff of the

Aquarian Foundation, its members, and I have been subjected to numerous threats of violence in the form of telephone threats and personal appearances of unnamed individuals. These threats have occurred at both the Aquarian Foundation offices and my personal residence in Seattle, Washington.

3. That, through documenting these incidents, the following are representative samples of the threats and harassment of myself and the members of the Aquarian Foundation: December 1978, firebomb thrown through a window of the Aquarian Foundation church; September 6, 1978, telephone threat on my life and a statement that the church would be "blown up"; September 6, 1978, a man entered the church armed with a weapon asking about my whereabouts; December 6, 1979, threatening phone call; January 30, 1980, telephone call received by office staff wherein my life was threatened; February 7, 1980, man with a gun appeared on the front lawn of the Aquarian Foundation property, brandished a weapon and pointed the same at the church. While brandishing the weapon, the statement was often repeated that, "I'm gonna' kill that Rhinehart."; March 12, 1980, telephone threat received stating an intent to kill, cut, and slash Rev. Keith Milton Rhinehart; March 12, 1980, telephone threat received wherein my personal residence was referenced and the statement made that it would be "burned to the ground"; May 27, 1980, obscene telephone call wherein physical violence was threatened; June 5 and 6, 1980, unnamed individual appeared at the Foundation location with what appeared to be a firearm on his person.

4. During the period of time referenced in this affidavit, I have been subjected to obscene, harassing and highly embarrassing comments and threats by these unnamed individuals. As a direct result of the threatened and actual violence exhibited towards myself and the Aquarian Foundation, I am in constant fear of my personal physical well being.

5. As a result of the above-referenced conduct, I have been fearful of returning to my now-publicized residence located in Seattle. During intermittent stays in the Seattle area, I have avoided public awareness of my location. It is my belief and

42a

conviction that should my temporary residence be known, my life and physical well being will be threatened.

/s/ KEITH MILTON RHINEHART

(Jurat omitted in printing.)

APPENDIX F

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

---

No. 80-2-02460-4

---

KEITH MILTON RHINEHART, a single person, *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES *et al.*,  
*Defendants.*

AFFIDAVIT OF JILLENE AVALOS

I am hereby officially resigning from the position of Secretary of the Aquarian Foundation, and leaving Seattle for the following reasons.

Although I was thoroughly briefed by Rev. Keith Rhinehart before accepting this position of Secretary to the Aquarian Foundation, regarding the many death threats and verbal and physical violence perpetrated against the Aquarian Foundation and various individual members as a result of the Walla Walla Union Bulletin and the Seattle Times articles, I did not fully comprehend the intensity of the reality of the situation.

During my employment my family and I have been subject to great psychological pressures as well as physical danger, such as when my husband, Tony, was shot at while in a 7-11 Store, shortly after having been identified in a car with Rev. Rhinehart. I can no longer subject my husband, myself or my five-year old daughter to this danger. The normal workload of this position has also been greatly increased due to the Seattle Times Case, et al attorney's tactics, causing me great mental and physical strain and fatigue. My family and I cannot stand the fear of having to live here in Seattle anymore due to these threats. I know that my expertise in my secretarial duties will



be difficult to replace, and the training I have undergone these many months is now down the drain, but I cannot stand seeing a fine person like Rev. Rhinehart being subjected to the suffering of being confined in a tiny place in hiding because of the continued threats on his life and his unwillingness to place us and his congregation in further danger by his showing up at his home, or at the Church here in Seattle.

10-15-80

/s/ JILLENE AVALOS

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JILLENE AVALOS

/s/ [illegible]

/s/ ANTONIO AVALOS

---

Antonio Avalos

## APPENDIX G

## SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

---

 No. 80-2-02460-4
 

---

KEITH MILTON RHINEHART, a single person, *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, *et al.*,  
*Defendants.*

## AFFIDAVIT OF LINDA DUNN

STATE OF WASHINGTON }  
 COUNTY OF KING } ss.

LINDA DUNN, being first duly sworn upon oath, deposes and states:

1. I have been a member of the Aquarian Foundation since 1975. I am 24 years of age and have personal knowledge of the facts set forth in this affidavit.

2. Since I have been a member of the Aquarian Foundation, Foundation members have always assumed their names and the amount of their contributions would remain confidential. Members were also assured by Foundation representatives that their names and the amount of their contributions would remain confidential. The members desire confidentiality because they are afraid of losing their jobs, disinheritance, and other economic reprisals. Foundation members are also afraid of harrassment.

3. Since the publication of the series of articles about the Aquarian Foundation, its minister, and its members in the Walla Walla Union-Bulletin and the Seattle Times starting in February 1978 to current times, there have been a series of

death threats and incidents directed at the Aquarian Foundation, its minister, and its members. The following are examples of some of the many incidents that have occurred:

a. There have been repeated phone calls to the church threatening to blow up the building; threatening to kill our minister; and labeling all members of the Aquarian Foundation as homosexuals and terrible people. On Christmas Day, 1978, a bomb was thrown into the Aquarian Foundation Mother Church building. There have been several incidents when people have come to the church armed with weapons. An individual came to the church with a rifle, cocked it, and pointed it at the building with the church staff inside, while screaming obscenities and threatening to kill Reverend Rhinehart and members of the Aquarian Foundation. An elderly woman was hit over the head with a shovel and bloodied on the church steps.

b. On November 13, 1980, at 2:00 a.m., I was working at my place of employment, the Aquarian Foundation at 315 15th Avenue East, Seattle, Washington. At this time, I heard shouting coming from the street. I was sitting near a window facing 15th Avenue East on the second floor of the building. I heard the following shouts: "Kill all faggots! Kill all faggots! Lacitis had it right. Lacitis had it right. Kill all faggots! Kill all faggots! Rhinehart is a dirty faggot. You're 'all a bunch of dirty faggots. Kill all faggots! Kill all faggots!" This was repeated in a type of marching beat.

I went to the window, looked out and saw four persons shouting the aforesaid threats walking north on 15th Avenue East in front of the church. They faced away from me and crossed the corner of Thomas and 15th Avenue East, the northeast corner of the Aquarian Foundation lot. Looking down from the second story window I could see their backs and the tops of their heads. From their tone of voice, their gait and their dress, I believe that these persons were males. One person was wearing a white T-shirt, another an orange jacket, another a light blue jacket and another a navy jacket. They continued repea-

ting aforesaid threats as they walked northward up the street.

I notified my fellow employees, Catherine Harold and David Massena of the incident. Then I called the Seattle police department and reported this incident. At approximately 2:40 a.m. Officer Hinz, serial number 3950, Unit 440, arrived at the Aquarian Foundation. I gave him a report of what happened. The police report number is 80-456524. Officer Hinz told me that he knew of several articles that Erik Lacitis had written about Reverend Rhinehart and said that Reverend Rhinehart "had gotten a bad write up." He also remembered some T.V. broadcasts about Reverend Rhinehart.

c. Two days later on November 15, 1980, at approximately 2:00 a.m. I was again at the Aquarian Foundation working. The doorbell rang several times. I was alone in the building, a rare occasion as there is usually someone at the Aquarian Foundation twenty-four hours a day. On this particular day, however, no one on the staff was due to arrive until 11:00 a.m.

I called my husband at home to see if he had come to pick me up. He had not. At approximately 3:40 a.m. the doorbell rang again. At approximately 3:50 a.m. I called the Seattle Police Department and reported these incidents. At 4:10 a.m. Officer G. Kindle, identification number 2972, arrived at the Aquarian Foundation. I told Officer Kindle about my concern over the possible danger to me in light of the numerous death threats that have occurred since the publication of a series of libelous articles about the Aquarian Foundation and Reverend Rhinehart that appeared in the Seattle Times and the Walla Walla Union Bulletin.

Officer Kindle told me that he was familiar with the Lacitis articles about the Aquarian Foundation and had heard about "Rhinehart and his Cadillac" and had "seen something on T.V." [about Reverend Rhinehart.] Officer Kindle said that Lacitis was well-known by members of

the Seattle Police Department and others and stated that "I even know about Lacitis."

4. I know of no threatening incidents of this nature to occur at the Aquarian Foundation prior to the publication of these articles about the Aquarian Foundation and its minister.

5. Upon the above information and knowledge of aforementioned articles and the John Wilson series of articles about Reverend Rhinehart and the Aquarian Foundation published in the Seattle Times beginning in 1975, I believe that the lives of members of the Aquarian Foundation including Reverend Rhinehart's have been severely threatened and have suffered great harm as a direct result of all said articles.

6. The threats against Reverend Rhinehart's life have forced him to hide and to conceal his identity. Because their leader was forced to avoid Seattle, Seattle area Foundation members have been deprived of the opportunity to meet with him personally.

7. Prior to 1978, many people attended our meetings and services in Seattle. The chapel was frequently full and overflowed into the hall. Now only a few people attend our Seattle meetings.

/s/ LINDA DUNN

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Linda Dunn

(Jurat omitted in printing.)



# APPENDIX H

## SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

---

No. 80-2-02460-4

---

KEITH MILTON RHINEHART, a single person; The Aquarian Foundation, a Washington not-for-profit corporation; *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times, *et al.*,

*Defendants.*

### AFFIDAVIT OF MARILOU MCINTYRE

I, MARILOU MCINTYRE, would like to state for the record that I received an envelope postmarked June 4, 1979, at my home address in Portland, Oregon. Included among its contents was a copy of a newspaper article entitled "Strange Acquaintance With The Aquarians," by Erik Lacitus. Written at the top of this article, in blue ink, was the statement: "You are an accomplice in the eyes of justice!!!!". The envelope also contained an article apparently taken from FATE MAGAZINE entitled: "Jim Jones and Cults of Death!". Written, in hand, on the bottom of the front page, was the following: "Typical Cult Leaders like Rhinehart who use E.S.P. and mind control tactics for control over followers!".

My name and address was typed on the front of the envelope. In the lower left-hand corner was written in pen: "The Gig is up!", with "PERSONAL" typed above it. The name of Tony Strauch and her address—6042 Summer, Honolulu, Hawaii 96821, was printed in the upper left-hand corner. Tony is known by me as a good member of our church. I was extremely distressed after opening this envelope and reading

the hate material it contained. I could not believe that a good member of our church, from another state, would send me such filth.

I was unable to sleep for several nights and have been extremely upset emotionally. It is hard for me to believe that my good friend could conceive of doing such a thing and could really become convinced enough to spread the vicious and malicious lie that Reverend Rhinehart and The Aquarian Foundation were running a Jim Jones-type death cult. As a Spiritual Leader in the Aquarian Foundation, myself, it implied that I was doing the same, and I know this is untrue.

After reading the article about "Death Cults," it became evident my friend had drawn an incorrect parallel between The Aquarian Foundation and the Jim Jones Cult, as was evidenced by the handwritten statement on the article.

I have not been able to understand whether the innuendos, in handwriting, mean an implication of wrong-doing on my part. I have never done anything wrong and have always considered myself to be a good and moral woman who loves God and my fellow beings. The phrase on the envelope stating: "The Gig is up!", has caused me to fear for the safety and well-being of myself and the well-being of my Spiritual Leading and my church. At that time of this writing, I am still in a state of anxiety which is affecting my ability to function properly.

Signed:           /s/ MARILOU MCINTYRE

Marilou McIntyre

Marilou McIntyre  
2020 S.W. Salmon  
Portland, Oregon 97205

(Jurat omitted in printing.)

APPENDIX I

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

---

No. 80-2-02460-4

---

KEITH MILTON RHINEHART, *et al.*,

*Plaintiffs,*

vs.

THE SEATTLE TIMES, *et al.*,

*Defendants.*

OPINION GRANTING PLAINTIFFS' MOTION FOR  
PROTECTIVE ORDER

The defendants in this case are engaged in extensive discovery which requires that the plaintiffs disclose a great deal of information which would normally be kept confidential. The Court has ordered disclosure of statements of assets and liabilities, other financial and investment information, names and addresses of persons involved in the Aquarian Foundation and other information which the defendants normally would not receive.

The Court has ordered disclosure of this information pursuant to the provisions of Civil Rule 26(b)(1) which provides as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including

the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Those drafting Rule 26 recognized that along with liberal discovery there was a need for protective orders in order to protect a party from abuse or embarrassment and in order to prevent unbridled dissemination of information which a party gained only through the discovery process.

One of the defendants in this case is The Seattle Times, a daily newspaper with a heavy readership in western Washington and which is distributed throughout the entire state.

The Seattle Times asserts that it has a right under the First Amendment of the United States Constitution to print in its newspaper any information it gains through the discovery process in this case. In effect, The Seattle Times argues that Rule 26(c) providing for Protective Orders simply does not apply to a daily newspaper because of its First Amendment rights.

As counsel for the plaintiffs has very ably pointed out, all persons and all legal entities are protected in their freedom of expression by the First Amendment. It applies to everyone, not just newspapers, magazines, radio stations and television stations. Thus there would seem to be no basis for treating a litigant who happens to be a newspaper publisher any different from any other litigant insofar as a litigant's rights under the First Amendment are concerned.

Protective Orders are entered routinely in cases where the party seeking the Protective Order has a reasonable basis for its request that the information gained through discovery be used by the discovering party for no purpose other than the legitimate purposes of the case in which discovery was granted. This

means that the information is not disseminated any more than is absolutely necessary for the discovering party to prepare for trial and to try his case.

The plaintiffs here have reasonable grounds for the issuance of such an order in connection with information developed regarding the financial affairs of the various plaintiffs, names and addresses of Aquarian Foundation members and those contributing funds to the Foundation and names and addresses of those who have been contributors, clients or made donations to the Aquarain Foundation or the Plaintiff Rinehart.

Counsel for the defendants has pointed out that a Protective Order cannot apply to information gained by a litigant about his opponent which is not gained through the use of one or more of the discovery vehicles provided by the Civil Rules. This contention is correct. The Protective Order in this case has no application except to information gained by the defendants through the use of the discovery processes.

The intent and purpose of the Protective Order will be that the discovering party make no use or dissemination of the information gained through discovery other than such use as is necessary in order for the discovering party to prepare and try the case. It follows that information gained through the discovery process will not be published by The Seattle Times or made available to any news media for publication or dissemination.

Defendants argue that a Protective Order which has the effect of preventing publication of information gained through discovery in its daily newspaper violates freedom of the press rights guaranteed by the First Amendment. Defendants cite cases in support of their position. The case of *In Re Halkin*, 598 F.2d 176 is a case in point because it involves the use that can be made of information learned through the discovery process. *Halkin* emphasizes the importance of First Amendment rights and holds that if a Protective Order restricting First Amendment rights is to be entered such an order should be narrow in scope, necessary because of the threatened harm and the lack of any reasonable alternative. *In Re Halkin* holds that the First Amendment applies to discovery materials. In *Halkin*



the defendants did not request a Protective Order prior to discovery. The request was made only after the plaintiff had gained the discovery materials and then announced that it intended to release the information to the press. The *Halkin* opinion does not deal directly with the question of the relationship between a Protective Order and First Amendment rights.

Provision for a Protective Order was adopted in the first place so that the Court, in the interest of full disclosure and litigation, could order production of information normally kept confidential and then protect against abuse by requiring that the information receive only such dissemination as was necessary in the handling and preparation of the particular case involved.

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Counsel for plaintiffs can present an order consistent with this opinion.

DATED AT SEATTLE, WASHINGTON this 10th day of June, 1981.

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/s/ JACK P. SCHOLFIELD

Jack P. Scholfield, Judge

APPENDIX J

SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

---

No. 80-2-02460-4

---

KEITH MILTON RHINEHART, a single person; The Aquarian  
Foundation, a Washington not-for-profit corporation; *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle  
Times, *et al.*,

*Defendants.*

SUPPLEMENTAL AFFIDAVIT OF MARILOU MCINTYRE

Attached is the Supplemental Affidavit of Marilou McIntyre. The Affidavit is substantially identical to the Affidavit of Marilou McIntyre filed in this section on May 7, 1981. The Supplemental Affidavit states additionally that Marilou McIntyre now knows that Toni Strauch did not send the envelope referred to in the Affidavit.

DATED this 23rd day of June, 1981.

EDWARDS & BARBIERI

By: /s/ ROBERT G. SIEH

Robert G. Sieh

*Attorneys for Plaintiff McIntyre*

I received an envelope postmarked June 4, 1979, at my home address in Portland, Oregon. Included among its contents was a copy of a newspaper article entitled "Strange Acquaintance With the Aquarians" by Erik Lacitis. Written at

the top of this article, in blue ink, was the statement: "You are an accomplice in the eyes of justice!!!". This envelope also contained an article apparently taken from FATE MAGAZINE entitled: "Jim Jones and Cults of Death!". Written, in hand, on the bottom of the front page, was the following: "Typical Cult Leaders like Rhinehart who use E.S.P. and mind control tactics for control over followers!"

My name and address was typed on the front of the envelope. In the lower left hand corner was written in pen: "The Gig is up!" with "PERSONAL" typed above it. The name Toni Strauch and her address-6042 Summer, Honolulu, Hawaii, 96821, was printed in the upper left hand corner. Toni is known by me as a good member of our church. I was extremely distressed after opening this envelope and reading the hate material it contained. I could not believe that a good member of our church, from another state, would send me such filth.

I was unable to sleep for several nights and have been extremely upset emotionally. It is hard for me to believe that my good friend could conceive of doing such a thing and could really become convinced enough to spread the vicious and malicious lie that Rev. Rhinehart and the Aquarian Foundation were running a Jim Jones-type death cult. As a Spiritual Leader in the Aquarian Foundation, myself, it implied that I was doing the same, and I know this is untrue.

After reading the article about "Death Cults," it became evident that someone was trying to make me think my friend had drawn an incorrect parallel between the Aquarian Foundation and the Jim Jones Cult, as was evidenced by the handwritten statement on the article.

I have not been able to understand whether the innuendos, in handwriting, mean an implication of wrong doing on my part. I have never done anything wrong and have always considered myself to be a good and moral woman who loves God and my fellow beings. The phrase on the envelope stating: "The Gig is up!", has caused me to fear for the safety of myself and the well being of my Spiritual Leader and my Church.

At the time of this writing, I am still in a state of extraordinary anxiety which is affecting my ability to function properly.

Since recording the above I have found out that Toni Strauch did not have anything to do with writing or sending me the letter.

Signed: /s/ MARILOU MCINTYRE

(Jurat omitted in printing.)

APPENDIX K  
IN THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

---

No. 80-2-01460-4

---

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

*Defendants.*

ORDER COMPELLING DISCOVERY

THIS MATTER came on for hearing on defendants' second motion to compel discovery (filed December 5, 1980) and plaintiffs' request for protective orders. The court heard oral argument on January 27, 1981, and issued an opinion by letter dated February 17 and signed on February 25, 1981. Pursuant to the opinion, both sides have submitted supplemental responses, and plaintiffs have moved for reconsideration of certain portions of this court's letter opinion. Having again heard oral argument on April 17 and May 29, having considered the additional submissions by the plaintiffs and defendants, and having submitted a letter opinion indicating an intention to enter a protective order which is being signed as a separate



order, and being fully advised, NOW, THEREFORE, THE COURT  
HEREBY ENTERS THE FOLLOWING

### ORDER

1. Plaintiff Rhinehart is ordered to answer Interrogatory No. 28 (all interrogatory references herein are to defendants' first interrogatories) concerning gifts and donations since February 15, 1975, whether received by plaintiff Rhinehart as taxable income or as nontaxable income, and whether classified as gifts or donations from personal services or as gifts for private readings, private group seances, master classes, or in connection with sacred objects. The cutoff date of February 15, 1975, does not prevent defendants from seeking an earlier date on a proper showing.

2. Interrogatory No. 31 asked plaintiff Rhinehart to disclose the name and address of everyone who has been a member of the Aquarian Foundation at any time in the past ten years. Interrogatory No. 27 to the Aquarian Foundation asks the same question. In lieu of answering the interrogatory at this time, plaintiffs Rhinehart and the Aquarian Foundation must provide defendants with documentary evidence in support of the Aquarian Foundation's supplemental answer to Interrogatory No. 27, and plaintiffs are ordered to make the bookkeeper referred to in the supplemental answer available for a deposition by defendants, and they are ordered to have those portions of the books and records used to make the diminished membership compilation available for examination at the deposition by defendants' counsel. Following the deposition, if defendants feel that they still cannot defend against the claim of diminished membership without obtaining the names and addresses of the Aquarian Foundation members, they may renew their motion to compel plaintiff Rhinehart to answer Interrogatory No. 31 and to compel plaintiff Rhinehart to answer Interrogatory No. 31 and to compel the Aquarian Foundation to answer Interrogatory No. 27.

3. Plaintiff Rhinehart's objection to Interrogatory No. 38 is sustained because he has already answered the question in his deposition.

4. The existing answer to Interrogatory No. 42 is unresponsive, and plaintiff Rhinehart is ordered to answer Interrogatory No. 42. ,

5. Plaintiff Aquarian Foundation is ordered to answer Interrogatory No. 5, and is specifically ordered to include the addresses which were withheld in the supplemental answers dated March 30, 1981. In answering this interrogatory, plaintiff Aquarian Foundation is required to include information within the knowledge of its present or former attorneys, and specifically former attorney Jack E. Wetherall is directed to assist in answering this interrogatory.

6. The information requested in Interrogatory No. 15 to the Aquarian Foundation is not protected by the attorney-client privilege, and the Aquarian Foundation is ordered to file a responsive answer.

7. Plaintiff Aquarian Foundation is ordered to answer Interrogatory No. 19. The supplemental answer of March 30, 1981, is unresponsive.

8. Plaintiff Aquarian Foundation is ordered to answer Interrogatory No. 21 to the extent of the information available to or known to the Aquarian Foundation.

9. Plaintiff Aquarian Foundation is ordered to answer Interrogatory No. 24 concerning all gifts and donations since February 15, 1975, to the extent that such information exists in its records. The scope of this interrogatory includes donations for renewal of membership or donations for new memberships, and contributions to causes, marches, private readings, group seances, classes, or in connection with sacred objects.

10. Plaintiff Aquarian Foundation's obligations with respect to Interrogatory No. 27 are already covered in paragraph 2 of this order.

11. Plaintiff Kathi Bailey is ordered to answer Interrogatory No. 7, which has been done in her supplemental answers dated March 26, 1981.

12. Defendants' motion to compel further answer to Interrogatory No. 9 is denied, because the court was not presented with any precise objection to the response as stated.

13. Plaintiff Bailey is ordered to answer Interrogatory No. 10, which has been done in her supplemental answers dated March 26, 1981.

14. Plaintiff Bailey is ordered to answer Interrogatory No. 14. Her original answer was nonresponsive, and her supplemental answer of March 26, 1981, is likewise nonresponsive. As a member and assistant spiritual leader of the Aquarian Foundation, plaintiff Bailey is required to answer this interrogatory to the extent of her present knowledge.

15. Plaintiff Bailey is ordered to answer Interrogatory No. 19, which has been done in her supplemental answers of March 26, 1981.

16. Plaintiff Bailey is ordered to answer Interrogatory No. 25.

17. Plaintiff Bailey is ordered to answer Interrogatory No. 28 for the time period from February 15, 1975, to the present.

18. Plaintiff Bailey is not required to answer Interrogatory No. 31 at this time, pending completion of the deposition referred to in paragraph 2 of this order.

19. Plaintiff Bailey is not ordered to answer Interrogatory No. 33. Defendants may inquire by deposition as to whether she had personal knowledge of the breast augmentation surgery, whether plaintiff Rhinehart told her of it, and whether he told her why he had the surgery.

20. Plaintiff Bailey is ordered to answer Interrogatory No. 34, limited to plastic surgery on plaintiff Rhinehart's face.

21. Plaintiff Bailey is not ordered to answer Interrogatory No. 38. Defendants may inquire by deposition as to whether she knows if plaintiff Rhinehart shares the anatomy of both sexes, how she acquired that information, and what is the extent of her knowledge.

22. Plaintiff Bailey is ordered to answer Interrogatory No. 41, which has been done in her supplemental answers of March 26, 1981.

23. Plaintiff Bailey is not ordered to answer Interrogatory No. 42 ~~because the information requested is irrelevant.~~

24. Plaintiff Lillian Young is ordered to answer Interrogatory No. 7, which has been done in her supplemental answers dated March 25, 1981.

25. Plaintiff Young is ordered to answer Interrogatory No. 10, which has been done in her supplemental answers.

26. Plaintiff Young is not required to answer Interrogatory No. 31 at this time for the reasons stated in paragraph 2 of this order.

27. Plaintiff Young is ordered to answer Interrogatory No. 41, which has been done in her supplemental answers of March 25, 1981.

28. Plaintiff Toni Strauch is ordered to answer Interrogatory No. 10, which has been done in her supplemental answers of March 26, 1981.

29. Plaintiff Strauch is ordered to answer Interrogatory No. 19, which has been done in her supplemental answer.

30. Plaintiff Strauch is not required to answer Interrogatory No. 31 at this time for the reasons stated in paragraph 2 of this order.

31. Plaintiff Strauch is ordered to answer Interrogatory No. 41, which has been done in her supplemental answers.

32. Plaintiff Ilse Taylor is ordered to answer Interrogatory No. 19, which has been done in her supplemental answers dated March 17, 1981.

33. Plaintiff Taylor is not ordered to answer Interrogatory No. 42 ~~because the information requested is irrelevant.~~

34. The court declines to rule at this time on the adequacy of the document production heretofore requested or made by the parties, and instead directs that a new request for production of documents be filed by defendants in strict compliance with Civil Rule 34. Plaintiffs shall respond to the request in strict compliance with Rule 34. This ruling shall apply also to the requested production of video and sound tapes.

35. Except where indicated otherwise, every order to answer a specific interrogatory requires the answering party to

answer completely and fully under oath as to all information which is available to that party or his, her, or its counsel. Answers shall be served and filed within 30 days after entry of this order, provided that if any defendant seeks review of the protective order entered in this cause, answers shall not be due until such time as the court shall determine by order entered after the review process has been completed, with the court reserving the right to redetermine what discovery shall be ordered in the event the protective order is modified on review.

DATED this 26 day of June, 1981.

/s/ JACK P. SCHOLFIELD

Jack P. Scholfield, Judge  
King County Superior Court

Presented by:

EDWARDS AND BARBIERI

By /s/ MALCOLM L. EDWARDS

Malcolm L. Edwards  
*Attorneys for Plaintiffs*

## APPENDIX L

## SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

---

 No. 80-2-02460-4
 

---

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Plaintiffs,*

v.

THE SEATTLE TIMES, a Delaware Corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, Inc.; ERIK LACITIS AND JANE DOE LACITIS; JOHN WILSON and REBECCA KAREN WILSON; JOHN MCCOY AND KAREN MCCOY,

*Defendants.*

## PROTECTIVE ORDER

THIS MATTER having come on upon the motion of the plaintiffs for a protective order, and the court having reviewed the affidavits of Marilou McIntyre, Linda Dunn, Robert Plante, Gillene Avalos, and Catherine Harold, and the court having considered the positions advanced by plaintiffs ~~with respect to the rights of plaintiffs and members of the Aquarian Foundation to freedom of association and religion and to rights of privacy,~~ and the court having considered that the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts, and the court



being fully advised, NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have reasonable grounds for the issuance of a protective order.
  2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.
  3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.
  4. Defendants' motion for a stay is denied.
- June 26, 1981.

/s/ JACK P. SCHOLFIELD

Jack P. Scholfield, Judge  
King County Superior Court

Presented by:

EDWARDS AND BARBIERI

By /s/ MALCOLM L. EDWARDS

Malcolm L. Edwards  
Attorneys for Plaintiffs

APPENDIX M

JACK P. SCHOLFIELD

Presiding Judge

King County Superior Court

Seattle, Washington 98104

February 17, 1981

Davis, Wright, Todd, Riese & Jones  
Attorneys at Law  
4200 Seattle-First National Bank Bldg.  
Seattle, Washington 98154

Attn: Mr. Evan L. Schwab

Mr. Malcolm A. Edwards  
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Seattle, Washington 98164

Mr. Jack E. Wetherall  
Attorney at Law  
17130 Avondale Way N.E.  
Suite 113  
Redmond, Washington 98052

Mr. Lawrence R. Mills  
Attorney at Law  
3930 Seattle-First National Bank Bldg.  
Seattle, Washington 98154

Re: Rhinehart, et al. v. The Seattle Times, et  
al. King County Cause No. 80-2-02460-4

Defendants' Motion to Compel Production and  
Plaintiffs' Motion For Protective Order

Dear Counsel:

The defendants have moved for an order compelling discovery which relates both to answering interrogatories and production of documents and things and the plaintiffs have moved for a protective order in respect to any material the court orders produced or disclosed.

Paragraph five of the defendants' motion relates to certain interrogatories propounded to various plaintiffs and I will deal with those first.

Defendants request "complete and responsive answers" to Interrogatories No. 28, 31, 38 and 42 directed in Defendants' First Interrogatories to Plaintiff Rhinehart.

Interrogatory No. 28 reads as follows:

If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift.

The plaintiff objected to this interrogatory as being "not within the purview of discovery, and to answer the same would invade the privacy and other constitutional rights of members of the Aquarian Foundation."

Numerous cases dealing with objections to Civil Rule 33 have required that objections to interrogatories be sufficiently factual and specific that an attorney or a court reading the objection will know the precise reasons being asserted to support the objection

Plaintiffs have asserted as a basis for claiming damages in this case that voluntary support for the Aquarian Foundation has substantially diminished as a result of the allegedly libelous publications. It is very difficult for me to see how plaintiffs can make this allegation on the one hand and on the other hand object to inquiry as irrelevant or an unwarranted invasion of privacy. The interrogatory is directed to gifts and donations to the plaintiff Rhinehart. It is entirely possible, of course, that plaintiff Rhinehart has received gifts over the past ten years which have nothing to do with the damage issues in this case.

I will permit the plaintiff Rhinehart to file an amended answer to Interrogatory No. 28 if he cares to do so. In the absence of an amended response showing a definite reason why Interrogatory No. 28 should not be answered, the plaintiff Rhinehart will be directed to respond fully to Interrogatory No. 28. Plaintiff Rhinehart will have fifteen days from receipt of this letter by his counsel in which to file any such amended response.

Interrogatory No. 31 to plaintiff Rhinehart is as follows:

State the name and address of everyone who has been a member of the Aquarian Foundation at any time in the past ten years.

The objection to Interrogatory 31 is based upon an asserted constitutional right to privacy of each member of the Aquarian Foundation and their right to exercise freedom of religious choice. The objection also asserts that the question is "not within the realm of discoverable evidence" and the sole purpose of the interrogatory is for harassment.

Here again, the interrogatory is directed to the claim by plaintiffs that membership in the Aquarian Foundation has suffered because of the allegedly libelous publications by the defendants. The defendants have the right to investigate and test the accuracy of this claim. The question boils down to whether or not stating the name and address of every member at any time in the past ten years is necessary in order for defendants to defend against the claim of diminished membership.

The plaintiffs have the burden of proof on the issue of diminished membership. The theory of pretrial discovery is that a defendant is entitled to learn, within reasonable limits, in advance of trial the nature and extent of evidence he will be required to meet on a particular issue.

I will give the plaintiffs the option of setting forth in response to this interrogatory, a clear and unambiguous description of the evidence plaintiffs will introduce in support of their claim of diminished membership in the Aquarian Foundation. If documentary evidence is to be introduced in support of

the claim, then such documentary evidence must be provided as part of this response to Interrogatory No. 31. Exercise of this option by the plaintiffs would provide defendants with the evidence they must meet on the issue. If plaintiffs do not care to exercise this option, then Interrogatory No. 31 must be answered in full. If the plaintiffs do exercise the option, the defendants are not hereby precluded from further discovery procedures directed toward the optional answer to Interrogatory No. 31.

Interrogatory No. 38 reads as follows:

Do you share the anatomy of both sexes? Explain.

The plaintiffs' objection to Interrogatory No. 38 asserts that it is irrelevant; that its only purpose is to harass and annoy the plaintiff and that answering the question would be an invasion of plaintiff's privacy.

It is obvious, of course, that a person's anatomy is normally a private and confidential matter. A litigant would be required to discuss it only if it is clearly relevant and material to an issue in the case. I do not have before me at this time anything that tells me that whether or not the plaintiff Rhinehart shares the anatomy of both sexes is relevant and material to the issues in this case. Under these circumstances, I think it would be improper for the court to rule on Interrogatory No. 38 at this time. I will give the defendants fifteen days from the date of receipt of this letter to make a written showing of why an answer to Interrogatory No. 38 is relevant and material to the issues in this case. In the absence of such a showing the objection to Interrogatory 38 will be sustained.

Interrogatory No. 42 reads as follows:

Either list all of your current assets and liabilities, or attach a current financial statement to your answers to these interrogatories.

The answer refers the defendants to tax refunds produced in compliance with an earlier request for discovery.

In the allegedly libelous publications involved in this case there is at least a clear inference that the plaintiff Rhinehart is a fraud and engages in fraudulent and deceptive practices for the purpose of extracting substantial sums of money from gullible persons. If the evidence eventually showed that the plaintiff Rhinehart was penniless, it would not necessarily prove that the fraud charges were untrue. On the other hand, if the evidence eventually shows that he is a multimillionaire that evidence would not necessarily prove that the fraud charges are true.

At this time I do not have an adequate basis for ordering Interrogatory No. 42 answered. I will give the defendants fifteen days in which to make a written showing that would justify compelling an answer to Interrogatory No. 42. In the absence of such a showing, no further answer to Interrogatory No. 42 will be required.

Paragraph five of defendants' Motion to Compel Discovery moves for answers to Interrogatories 5, 15, 19, 21, 24 and 27 of Interrogatories to Plaintiff Aquarian Foundation.

Document 47 in Volume 2 of the file in this case contains the answers of the Aquarian Foundation to Defendants' First Interrogatories.

Interrogatory No. 5 to the Aquarian Foundation reads as follows:

Identify by name, title and address each individual who has been contacted by you, your attorneys, or someone acting on behalf of you or your attorneys in connection with the claims in the complaint.

The answer refers to the eleven people identified in answer to Interrogatory No. 2. The answer then states that persons contacted by the Board of Directors but is within the knowledge of the attorneys.

If information is discoverable it is no less discoverable because it is within the knowledge of an attorney of the responding party. There being no sustainable objections stated to Interrogatory No. 5, the plaintiff Aquarian Foundation is directed to answer the same.



Interrogatory No. 15 asks questions as to the basis of the damages claimed in this case including the nature of the damages, the basis on which damages are calculated and persons and documents relied upon in calculating the damage claims.

I do not have before me any specific objections to the answer provided to Interrogatory No. 15 and therefore the motion to compel additional response to Interrogatory No. 15 by the Aquarian Foundation is denied.

Interrogatory No. 19 is as follows:

State the name and address of each bank, credit union, or other lending institution to which you have submitted financial statements in the past ten years.

The answer to Interrogatory No. 19 asserts a right to conceal the location of a bank with which the Aquarian Foundation is doing business on the theory that it would reveal temporary living quarters of persons active in the Foundation including the plaintiff Rhinehart.

Plaintiff will be required to respond fully to Interrogatory No. 19 and the objections stated in the answer of disallowed.

Interrogatory No. 21 requests the address of certain named persons. Civil Rule 33 requires answers where the information is in the possession, custody or available to the responding party. There being no stated objection to Interrogatory No. 21, the addresses of the named persons will be provided in response to Interrogatory No. 21 if those addresses are available to or in the possession or known to the Aquarian Foundation.

Interrogatory No. 24 reads as follows:

If you have been the recipient of gifts or donations in the past ten years, state the name and address of each donor, the date of the gift, the amount of the gift and the circumstances of each gift.

This interrogatory goes directly to the issue of the plaintiffs' claim that contributions to the Aquarian Foundation have

diminished substantially by reason of the alleged libelous publications.

The objection states that identity of donors is believed to be protected. No basis for the belief is asserted. There being no valid objection stated to the interrogatory, the Aquarian Foundation will answer the same forthwith to the extent that it has the requested information in its custody, possession or available to it.

Interrogatory No. 27 reads as follows:

State the name and address of everyone who has been a member of the Aquarian Foundation at any time in the past ten years.

The plaintiff objects to this interrogatory on the ground that "it believes names of members are constitutionally protected under the first amendment." The plaintiff cannot assert a claim based on alleged diminished membership in the Foundation and refuse to respond to discovery requests whereby the defendants can test and evaluate the accuracy of this claim.

A similar interrogatory was directed to the plaintiff Rhinehart and the Court extended to the plaintiff Rhinehart an option or an alternative way of providing information by which the defendants could be advised of the basis upon which the plaintiffs will attempt to prove a claim of diminished membership. The same option will be extended to the Aquarian Foundation in respect to Interrogatory No. 27. Paragraph five of defendants' Motion to Compel Discovery requests an order directing the plaintiff Kathi Bailey to respond to Interrogatories Nos. 7, 9, 10, 14, 19, 25, 28, 31, 33, 34, 38, 41 and 42.

Plaintiff Bailey's answers to the Interrogatories were filed July 28, 1980 as document 51 in Volume 2 of the Clerk's file.

Interrogatory No. 7 asks for identity of each individual contacted by her or her attorneys in connection with the claims in the complaint and she states that she does not have information as to persons contacted by her attorneys. This not being a valid objection to the interrogatory and no other

objection being stated, plaintiff Bailey will be required to respond fully and completely to Interrogatory No. 7.

Interrogatory No. 9 requests that she identify all documents having any relevance in support of the claims made in the complaint. A response is made to this interrogatory and the Court not being presented with any precise objection to the response as stated, the Motion to Compel Further Answer to Interrogatory No. 9 is denied.

Interrogatory No. 10 reads as follows:

Identify every corporation, partnership, or association in which you are presently an officer, director, shareholder, partner or member, and also identify each such organization in which you have held any of said positions in the past ten years.

While it would be easy to formulate a precise objection to this interrogatory, none was stated other than "objected to on grounds of relevance." Objections to interrogatories must be stated with sufficient specificity that an attorney or court reading the objection would know the factual and legal basis for it. There being no adequate objection stated to Interrogatory No. 10, the objection is overruled and the plaintiff Bailey is directed to answer the same.

Interrogatory No. 14 requests identification of each officer and director of the Aquarian Foundation and affiliated or subsidiary organizations. The answer is nonresponsive and the Motion to Compel a Complete Answer to Interrogatory No. 14 is granted.

Interrogatory No. 19 asks specific questions relating to the sources and computation of damages claimed by the plaintiff Bailey.

The answer No. 19 is unresponsive and the Motion to Compel a Complete Answer to Interrogatory No. 19 is granted.

The Interrogatory No. 25 is unresponsive and the Motion to Compel a Complete Answer to Interrogatory No. 25 is granted.

Interrogatory No. 28 deals with gifts and donations to plaintiff Bailey during the past ten years. Not being presented with any objections to the answer as stated, the Motion to Compel Further Answer of Interrogatory No. 28 is denied.

Interrogatory No. 31 requests the names and addresses of members of the Aquarian Foundation over the past ten years. The interrogatory is objected to but the objection is based only on the claim of the plaintiff that the names and addresses are "nondiscoverable." This is not a suitable objection. Court will extend to plaintiff Bailey the same option extended to the plaintiff Rhinehart and the plaintiff Aquarian Foundation in connection with responding to this interrogatory.

Interrogatory No. 33 reads as follows:

To the best of your ability describe why Keith Milton Rhinehart had breast augmentation surgery.

The answer would appear to assert a privilege possessed only by the plaintiff Rhinehart unless it is interpreted as meaning that plaintiff Bailey has no knowledge with which to respond to the interrogatory. In the absence of a showing by the defendants as to why an answer to this interrogatory should be compelled from plaintiff Bailey no further answer to Interrogatory No. 33 will be required. The defendant will be given fifteen days in which to make such a showing.

Interrogatory No. 34 requests a description from this plaintiff as to why the plaintiff Rhinehart had plastic surgery. The court's ruling will be the same in respect to Interrogatory No. 34 as it was to Interrogatory No. 33.

The Court's ruling will be the same in respect to Interrogatory No. 38 as it was in connection with Interrogatories 33 and 34.

Interrogatory No. 41 is as follows:

Have you ever danced naked before member of the opposite sex. If the answer is in the affirmative, please give details and describe when and where you performed.

The answer states that the question appears to be in poor taste. This is neither an answer nor an objection. The plaintiff Bailey will be given fifteen days in which to file a specific objection to Interrogatory No. 4 which objection will be sufficiently specific so that the Court can rule upon it intelligently. In the absence of the filing of such an objection within fifteen days of receipt of this letter by counsel for plaintiff Bailey, the motion of the defendant to have Interrogatory No. 41 answered will be granted.

Interrogatory No. 42 asks for a statement of current assets and liabilities or a current financial statement and the answer refers the defendants to tax returns to be provided. The Court has no knowledge at this time as to whether or not the tax returns were provided and whether or not they provided sufficient information that further answer to this interrogatory is unnecessary. The defendants will be provided fifteen days in which to furnish the Court with a written showing as to why Interrogatory No. 42 should be answered in full and in the absence of such a showing within fifteen days of receipt of this letter by counsel, no further answer to Interrogatory No. 42 will be required.

Defendants have also moved to compel plaintiff Lillian Young to answer Interrogatories Nos. 7, 10, 31 and 41.

Interrogatory No. 7 relates to persons contacted by her or her attorneys in connection with claims in the complaint.

The answer disclaims knowledge of persons contacted by her attorneys. This is knowledge imputed to the plaintiffs in the discovery process. Interrogatory No. 7 must be answered in full.

Interrogatory No. 10 requests identification of business associations in which plaintiff is an officer, director, shareholder, etc. The objection is "on ground of relevance". This must be answered in full.

Interrogatory No. 31 relates to the names and addresses of members of the Aquarian Foundation. The same option under the same circumstances will be extended to plaintiff Lillian



Young relative to answering this interrogatory as was extended to other plaintiffs.

Interrogatory No. 41 inquires as to whether or not plaintiff Young has ever danced naked before a member of the opposite sex. The objection appears to be based largely on a claim of irrelevance and the claim that the sole purpose of the interrogatory is to embarrass and degrade the plaintiff. The Court does not have before it adequate information for a ruling on this interrogatory. The objection does not set forth reasons why it is an irrelevant interrogatory. Plaintiff Young shall have fifteen days following receipt of this letter by her counsel in which to state a specific objection to Interrogatory No. 41, otherwise the Motion to Compel a Complete Answer to Interrogatory No. 41 will be granted.

Defendants have also moved to compel the plaintiff Toni Strauch to answer Interrogatories 10, 19, 31 and 41.

Interrogatory No. 10 requests identification of corporations, partnerships or other associations in which she has been an officer, director or shareholder. The interrogatory is answered in part but is objected to in part on ground of relevance. This is not a sufficient objection and the Motion to Compel a Complete Answer to Interrogatory No. 10 is granted.

Interrogatory No. 19 deals with the basis of the damage claim in this case. The answer is clearly unresponsive. The Motion to Compel a Complete Answer to Interrogatory No. 19 is granted.

Interrogatory No. 31 deals with the names and addresses of members of the Aquarian Foundation. The objection is clearly inadequate. The same option will be extended to plaintiff Strauch in answering this interrogatory as was extended in respect to the same interrogatory submitted to other plaintiffs.

Interrogatory No. 41 relates to the subject of dancing naked before members of the opposite sex. Plaintiff Strauch will be given fifteen days in which to state specifically the basis for the objection to this interrogatory and in the absence of such a written objection being filed within fifteen days following



receipt by plaintiff's counsel of this letter, the Motion to Compel a Complete Answer to Interrogatory No. 41 will be granted.

The defendants have also moved to compel plaintiff Taylor to answer Interrogatories 19 and 42.

I do not have before me the response of plaintiff Taylor to those two interrogatories. However, I have ruled on the same interrogatories in respect to other plaintiffs and it is probable that counsel can deal with interrogatories 19 and 42 to plaintiff Taylor based on the Court's rulings in respect to the other plaintiffs where the same interrogatories were answered and/or objected to.

In their Motion to Compel Discovery, defendants also seek strict enforcement of the Subpoena Duces Tecum to Merrill Lynch Pierce Fenner and Smith, Inc. which would compel production at the deposition of all records and files pertaining to plaintiffs Rhinehart and the Aquarian Foundation dealing with purchase and sale of securities, financial statements, internal memoranda concerning customers, customer profiles, and any other material pertaining to any business transactions between Merrill Lynch and either of said plaintiffs.

With the plaintiffs claiming adverse financial developments as a result of the allegedly libelous publications, it is obvious that defendants must be allowed to investigate the basis for this complaint. While evidence of financial transactions with a stockbroker is not direct evidence one way or another of the alleged financial impact of the articles, nevertheless information there discovered could be circumstantial evidence one way or the other and until the records are examined no one would know whether they might or might not lead to the discovery of admissible evidence.

At this time the Court has before it no reason or basis for quashing the subpoena to Merrill Lynch and declines to do so at this time.

The defendants' request for production of documents directed to the Aquarian Foundation resulted in the Foundation making an effort to provide those documents but this effort was

made under circumstances where very little discovery, if any, was actually accomplished.

Since counsel for the Aquarian Foundation did not know and couldn't even estimate the number of documents (between 3,000 and 10,000 or more) it is understandable that defendants had a difficult time conducting an examination of the produced documents.

It is the Court's view that the parties should, in effect, start over in respect to the request for production of documents directed by the defendants to the Aquarian Foundation. The Court is left with the impression that neither the plaintiffs nor the defendants followed Rule 34 in connection with this matter. If the defendants wish to pursue the matter, then the Court would direct that a request for production of documents in strict compliance with Rule 34 be initiated and that the response of the plaintiffs to the request also be in strict compliance with Rule 34. This will apply also to the requested production of video and sound tapes. Remaining to be ruled upon is the issue raised by the plaintiffs in claiming a protective order as to any information they are compelled to disclose in the discovery process in this case. Responding to the plaintiffs' claim for a protective order, the defendants assert that the right of a free press under the First Amendment effectively prohibits the Court from entering a protective order of the type sought herein by the plaintiffs.

The plaintiffs urge the Court to enter a protective order that would limit defendants' use of all discovery materials to the purposes of defending this lawsuit. The defendants on the other hand contend that they are entitled to publish any and all materials coming to them from the plaintiffs through the discovery process without any restriction whatsoever.

The case of *In Re Halkin*, 598 F.2d 176 (1979) holds that First Amendment rights extend to discovery materials. The opinion goes on to emphasize that "good cause" must be shown for a protective order. Commencing at page 191 of the opinion, the Court discussed a constitutional standard which must be met in dealing with a collision between claims of confidentiality

on the one hand and First Amendment interests on the other hand. At page 191 the Court states:

The Court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

The cases cited on this subject appear to come down to the proposition that when a court is confronted with the question of whether or not good cause exists for a protective order the case must be decided on its own facts with careful attention to the actual discovery materials involved, the extent to which good cause exists for a protective order and the scope of such an order, if one is to be entered, in order to prevent actual damage or a real threat of an unfair trial environment if the device of a protective order is not used.

In deciding *Halkin*, the Court brushed aside conclusory allegations as being insufficient to justify imposition of a protective order which would have had the effect of imposing prior restraint on the freedom of speech and of the press guaranteed by the First Amendment.

At this time, the plaintiff's motion for a protective order will be denied. This denial, however, is without prejudice to plaintiff's right to move for a protective order in respect to specifically described discovery materials and a factual showing of good cause for restraining defendants in their use of those materials.

While I apologize to counsel for the considerable period of time it has taken me to rule on the issues covered in this letter, I hasten to point out that much of the time was consumed in going through the three volumes of files that have accumulated in this case for no purpose than to discover what interrogatories were involved and what answers or responses were made to those interrogatories by the various plaintiffs.

It is very helpful to a court in ruling on motions to compel discovery to have both the interrogatory or particular discovery request involved set forth in the motion along with the objection or a synopsis of the objection so that it will be unnecessary for the court to thumb through the file in order to have this information.

Dated at Seattle, Washington this 25th day of February, 1981.

/s/ Jack P. Scholfield  
*Presiding Judge*

JPS:r

APPENDIX N

SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

No. 80-2-20460-4

KEITH MILTON RHINEHART, a single person; The Aquarian  
Foundation, a Washington not-for-profit corporation; *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle  
Times, *et al.*,  
*Defendants.*

AFFIDAVIT OF CATHERINE HAROLD

STATE OF WASHINGTON }  
COUNTY OF KING } ss.

CATHERINE HAROLD, being first duly sworn, on oath  
deposes and states:

1. I am the secretary to the Board of the Aquarian  
Foundation.

2. It would chill our members' rights to free association  
and to practice their religion if our membership lists were made  
available to the defendants in this case.

3. We are a minority religion in this area. Because our  
views are different from many others, uninformed people and  
those with interests inimicable to our faith may create problems  
for persons simply because they are members or intend to  
become members of the Aquarian Foundation.

4. Being required to disclose our membership list and our  
contributors would reduce our membership and diminish the

contributions necessary to the furtherance of our religious mission.

/s/ CATHERINE HAROLD

Catherine Harold

(Jurat omitted in printing.)



APPENDIX O

SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

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No. 80-2-02460-4

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KEITH MILTON RHINEHART, a single person, *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, *et al.*,  
*Defendants.*

AFFIDAVIT OF CATHERINE HAROLD

STATE OF WASHINGTON }  
COUNTY OF KING } ss.

CATHERINE HAROLD, being first duly sworn upon oath, deposes and states:

1. I am the secretary of the Aquarian Foundation. As secretary, I am custodian of the records of the Aquarian Foundation.

2. The Aquarian Foundation staff has compiled a partial summary of the threats, obscene phone calls, and incidents at the Aquarian Foundation which occurred after the publication of the John McCoy article on February 17, 1978 in the Walla Walla Union-Bulletin and the Erik Lacitis articles beginning in March 1978 by the Seattle times. Attached as Exhibits A through P are summaries and accounts of the incidents.

---

Catherine Harold

SUBSCRIBED AND SWORN to before me this       day of  
April, 1981.

---

Notary Public in and for the State of  
Washington, residing at

**EXHIBIT A**

**JUNE OF 1978:**

In June of 1978 Laddie Wright made a series of telephone calls to the Anchorage group. He threatened to kill the Center Leaders in various branches of the Aquarian Foundation and Reverend Keith Milton Rhinehart.

**EXHIBIT B**

**SEPTEMBER 6, 1978:**  
**(1:00 A.M.)**

Laddie Wright called the Aquarian Foundation located at 315-15th Avenue East in Seattle, Washington. During the course of his conversation, he intentionally, willfully and maliciously threatened to kill Rev. Keith Milton Rhinehart and to "blow up" the Seattle church.

**EXHIBIT C**

**SEPTEMBER 6, 1978:**  
**(10:00 P.M.)**

Laddie Wright entered the Aquarian Foundation located at 315-15th Avenue East in Seattle, Washington wired with a listening device and armed with a .357 magnum gun, a gun commonly used by police officers. See the attached information for details.

**EXHIBIT D**

IN THE

**SUPERIOR COURT OF THE STATE OF WASHINGTON**

IN AND FOR KING COUNTY

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**No. 850791**


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THE AQUARIAN FOUNDATION,

*Plaintiff,*

v.

LADDIE WRIGHT,

*Defendant.***AFFIDAVIT OF ROBERT PLANTE'**
 STATE OF WASHINGTON }  
 COUNTY OF KING

ss.

ROBERT PLANTE,' being first duly sworn upon oath,  
deposes and states:

1. I am an employee of plaintiff, The Aquarian Foundation.

2. On the night of September 5 and the morning of September 6, 1978 I was working at the Aquarian Foundation. I received a phone call from defendant Laddie Wright at approximately 1 a.m. on September 6, 1978. Defendant Laddie Wright threatened to kill the Reverend Keith Milton Rhinehart, who is the spiritual leader of our church, and threatened to blow up the church building in which I was working at 315—15th Avenue East, Seattle, Washington. Defendant Laddie Wright told me to leave the building because he had the materials to blow it up and he was one-half mile away. Defendant Laddie Wright identified himself as the caller.

3. Because of the manner in which defendant Laddie Wright made the threats, I believed that he intended to carry them out.

4. Subsequent to the evening of September 5 and the early morning of September 6, 1978, I have seen Laddie Wright in person and heard Laddie Wright's voice. His voice was the same voice as that of the person who identified himself on the phone.

DATED this 8th day of September, 1978.

/s/ ROBERT PLANTE

Robert Plante

(Jurat omitted in printing.)

## EXHIBIT E

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

---

 No. 850791
 

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THE AQUARIAN FOUNDATION,

*Plaintiff,*

v.

LADDIE WRIGHT,

*Defendant.*

## AFFIDAVIT OF JANE GOODMAN

STATE OF WASHINGTON	}	ss.
COUNTY OF KING		

JANE GOODMAN, being first duly sworn on oath, deposes and says:

1. I am secretary of plaintiff, the Aquarian Foundation and a member of its Board of Directors.

2. Based on my own contact with defendant and with his reputation among the members of the Aquarian Foundation, I am afraid that he will carry out his threats. The members of the Foundation are afraid that, if defendant is notified prior to obtaining of the temporary restraining order and preliminary injunction, that defendant will cause the members of the Foundation as well as its property irreparable physical injuries.

DATED this 8th day of September, 1978.

---

 /s/ JANE GOODMAN

Jane Goodman

(Jurat omitted in printing.)

**EXHIBIT F**

**NOVEMBER 24, 1978:**

An elderly woman, a member of the Aquarian Foundation, was hit over the head with a shovel by two males when on the doorstep of the church in Seattle. Her head was split open and she was bleeding profusely. She was taken to an emergency room of a local hospital for immediate medical attention. The elderly lady had severe bruises about the head and neck area for several weeks following the incident.

**EXHIBIT G**

**NOVEMBER 29, 1978:**

A phone call was received from Laddie Wright threatening to harm the members of the Aquarian Foundation in Alaska. He indicated he could come to New York if necessary and that his way was paid for; "they" had just been down to Los Angeles also and had gone down to Sunset Blvd., where the Aquarian Foundation Branch was located. Jane Goodman took the call, however, the tape was found to be scrambled and is therefore lost.

**EXHIBIT H**

**DECEMBER 25, 1978:**

The office staff was terrorized and feared for their lives after a fire bomb was thrown through a window of the Aquarian Foundation in Seattle, Washington. The window which was broken by the fire bomb was located on the second floor of the church.

**EXHIBIT I-1**

**DECEMBER 5 or 6, 1979:**

A phone call was received threatening Reverend Keith Milton Rhinehart with Blackmail. The voice was frightening and malicious and further terrorized the members of the Aquarian Foundation's staff in Seattle, Washington. Attached is a transcript of that call.

**EXHIBIT I-2**

**DECEMBER 5 or 6, 1979:**

Voice One: Hi, this is George Burns, seen the movie I made? How about it, Keith? Uh, let's get together, this is the 'Flyian Hawaiian'. I want you to call this mother fucking number as quickly as possible. I don't care if you have any



messengers or servants, I need some monetary ways of getting around. Now, I want you to call this or, I put you in jail for two years once, if you don't want to go back there again, try me. Bye bye.

### EXHIBIT J-1

JANUARY 30, 1980:

The office staff of the Aquarian Foundation in Seattle, Washington received a phone call threatening the life of Reverend Keith Milton Rhinehart.

### EXHIBIT J-2

JANUARY 30, 1980:

Voice One: Aquarian Foundation.

Voice Two: Yea, Keith Rhinehart, please.

Voice One: He isn't in.

Voice Two: Uh, yea, uh, say uh, what uh, I'd like to, he's not in?

Voice One: He's not; I don't know exactly where he is right now.

Voice Two: Oh yea,

Voice One: Yea.

Voice Two: You want to tell him the Mafia has a contract on him. I'm a Mafioso terrorist and he's the one that raped and murdered Joyce Scott and he shall go to a Mafia trial.

### EXHIBIT K

FEBRUARY 7, 1980:

The members of the staff of the Aquarian Foundation were again threatened intentionally with death and feared for their lives after watching the shocking incident of a male loading a shot gun on the sidewalk of the Seattle church. He cocked the gun and pointed it at the Foundation's building. The man directed obscenities and threats to Reverend Rhinehart, who was not present at the time, and to all members of the Aquarian Foundation. He was heard shouting, "You're all a bunch of fucking queers. Rhinehart is a fucking queer. I'm gonna kill that Rhinehart. I'm gonna kill all you fucking queers."

**EXHIBIT L**

**MARCH 12, 1980:**

The office staff and church were terrorized after receiving a call threatening to kill, cut, and slice Rev. Keith Milton Rhinehart, founder of the Aquarian Foundation, and it's members who he claimed were homosexuals and queers.

**EXHIBIT M**

Transcript of unidentified caller who made a telephone threat onto the recordophone at the Aquarian Foundation, 315 15th Ave. E., Seattle, Washington sometime between March 11, 1980 7:00 p.m. and March 12, 1980, 9:00 a.m. Reported to Seattle Police Officer H. J. Wallace Jr. who came by and listened to tape and assigned case number 80-105893 on March 12, 1980.

"I know you're queers; that's why I use your voice. Your house will burn to the ground. Keith Rhinehart will be dead. Those are my predictions for 1980 and I love to kill, I love to cut, I love to slice so listen clearly and listen dearly because all your so-called fuckin' loved-ones with their homosexual deviate apparitions of another world will be destroyed. You are homosexuals queers, fags. You don't use the word "gay" because that means happiness and there's nothing very happy about being a perverted mother fucker. **DEATH TO YOU, YOU ANTI-CHRISTS!**

End of Tape  
Feb. 9, 1981

/s/ CATHERINE HAROLD

Catherine Harold

(Jurat omitted in printing.)

**EXHIBIT N-1**

May 24, 1980:

An unidentified male left an obscene threatening message on the record-o-phone of the Aquarian Foundation, thus further terrorizing and shocking the office staff of the church located at 315-15th Avenue East in Seattle, Washington.

**EXHIBIT N-1**

May 24, 1980:

An unidentified male left an obscene threatening message on the record-o-phone of the Aquarian Foundation, thus further terrorizing and shocking the office staff of the church located at 315-15th Avenue East in Seattle, Washington.

**EXHIBIT O**

Just before Rev. Rhinehart was scheduled for a deposition with the Seattle Times, June 5 and 6, 1980:

On two consecutive days a man identifying himself as Noel was found sitting on the doorstep of the Aquarian Foundation at 315-15th Avenue East, Seattle, Washington, clutching a bible frantically. He approached the secretary, Jillene Avalos, with a wild-eyed look inquiring about the whereabouts of Reverend Rhinehart. After informing him that she did not know, Noel started raving religious statements madly. The secretary observed a bulge in his pocket which appeared to be a gun. The five-year-old daughter of the secretary, who was also present, was greatly distressed by these death threats.

I, Jillene Avalos, at the time of the above mentioned incident, was the Secretary of the Board of Directors of the Aquarian Foundation, and was present with my five-year-old daughter. I have read the above and know the same to be true.

March 9, 1981

/s/ JILLENE K. AVALOS

Jillene K. Avalos

(Jurat omitted in printing.)

## EXHIBIT P-1

## SWORN AFFIDAVIT OF JILLENE AVALOS

At the time of the following incident, the Affiant was employed as Secretary of the Board of Directors of the Aquarian Foundation. On Saturday, September 28, 1980, at approximately 11:00 a.m., the Affiant arrived at the Aquarian Foundation at 315—15th Avenue East and entered the porch area at the front of the church. Looking about the porch area before unlocking the front door, the Affiant noticed on one of the benches in the porch area a terrifying drawing of a red skull and cross-bones. The drawing was particularly disturbing as it had markedly jagged features not usually associated with the ordinary skull and cross-bones sometimes seen on labels of containers of poisonous materials. It was drawn in red, the color of blood. It was accompanied by an eight ball, a symbol often used to signify impending death.

See attached photograph. The red skull and cross-bones had not been there the previous night at approximately 8:00 p.m. At that time the Affiant had looked about the porch area while locking the front door of the church upon leaving work for the day.

Upon information and belief and knowledge of the numerous death threats directed toward the Aquarian Foundation, it's members, and it's founder since the publication of false and defamatory articles about them in the *Seattle Times* and the *Walla Walla Union Bulletin*, the Affiant is of the opinion that this incident with the red skull is another attempt to seriously torment and harm the Aquarian Foundation, it's founder, and it's members that would not have occurred had the aforesaid articles not been published.

March 9, 1981

/s/ JILLENE AVALOS

Jillene Avalos

(Jurat omitted in printing.)

(Photograph omitted in printing.)

APPENDIX P

SUPERIOR COURT OF WASHINGTON

FOR KING COUNTY

---

No. 80-2-02460-4

---

KEITH MILTON RHINEHART, a single person, *et al.*,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, *et al.*,  
*Defendants.*

SWORN AFFIDAVIT OF ROBERT PLANTE

I, Robert Plante, have been employed by the Aquarian Foundation located at 315—15th Avenue East in Seattle, Washington, for approximately three years. I am head of the Audio-Visual Department of the Aquarian Foundation.

Of the approximately 3 years that I have been employed by the Aquarian Foundation, I have lived in Seattle, Washington, from December 1977 to February 1980. I have been residing in another state after leaving Seattle because of intense fear and anxiety. The following paragraphs describe the reasons for my fears of living and working in the Seattle area for the Aquarian Foundation.

Since the publication of February 17, 1978, *Walla Walla Union Bulletin* article by John McCoy about the Aquarian Foundation presentation at the Walla Walla State Penitentiary, and the series of articles by Erik Lacitis about the Aquarian Foundation starting in March of 1978 in the *Seattle Times*, many terrifying and threatening incidents have taken place at the Aquarian Foundation.

One incident which happened on September 6, 1978, was a telephone call from an individual known as Laddie Wright at



1:00 a.m. Prior to this date I had received other threatening phone calls from this individual. The telephone conversation at 1:00 a.m. on September 6, 1978, involved Laddie Wright threatening to kill Reverend Keith Milton Rhinehart and to blow up the church located at 315—15th Avenue East, in Seattle. Since I worked in this building and spent much of my time there, I became fearful for my life at that time.

My fears became even stronger when Laddie Wright entered the church in Seattle on September 6, 1978, at approximately 10:00 p.m. He entered the church where I and others were working. I met with Laddie in the room off to the right of the front hallway as you enter the church. After entering the room, I sat down with him to question him about the threats that he had been calling in to the Aquarian Foundation which referred to killing Reverend Rhinehart and blowing up the church. Suddenly, Laddie opened his shirt to reveal that he was wired with instruments and listening devices. He told me in a note that the wires were transmitting to a van parked outside the church and that people were listening to the conversation we were holding. At a later date, it was learned that Laddie had been armed with a .357 magnum at the time of this incident, and had been sent in so armed by several law enforcement governmental agencies, including the U.S. Customs Agency. This increased my fears even more.

All of these incidents involving Laddie Wright's bomb threats, murder threats, and threatening phone calls were reported to the police department in Seattle. However, despite our reports, no results were obtained. It did not seem that the proper police authorities had any interest in pursuing Laddie Wright.

Another very disturbing incident happened on November 22, 1978. It was at approximately 7:00 p.m. and I had left the church located at 315—15 Avenue East in Seattle for only a short period of time. While I was gone, one of our elderly female members was attacked by two men while she was entering the front door of the church. The two men attacked her by beating her over the head with a shovel until her head was bleeding and blood was running down her face. It is

beyond my understanding why anyone would want to attack an elderly woman, especially on the front steps of a religious organization.

My fears were further strengthened on December 25, 1978 when I received a threatening phone call informing me that our church was going to be blown up. In this particular telephone threat, the caller spoke many obscenities and threatened the lives of many individuals connected with the Aquarian Foundation and especially the life of Rev. Keith Milton Rhinehart. During that same day after it was dark, a bomb did indeed come hurling through a second story window of the Aquarian Foundation located at 315-15 Avenue East in Seattle. When the bomb came through the window, it shattered but did not blow up. The bomb consisted of a wick in a coca-cola bottle with some kind of fluid with white substance-like powder in it. The wick showed signs of having been partially burnt. This took place on Christmas Day. I called the police department to have them come out and investigate this. Before they arrived, another one of our employees picked up the bomb off the floor and set it on a desk without thinking. The reason I mention this is because the other employee's finger prints would have definitely been on the bomb. I will refer to this point as I continue.

When the police responded to my call, the officer who arrived at the church informed me to take the bomb and throw it in the trash. I was extremely fearful and asked him to call the bomb squad in order to dispose of the bomb in the appropriate manner. The officer was hesitant to do this, but he eventually did call the bomb squad. When the bomb squad arrived, they came to the upstairs floor of the Aquarian Foundation to view the bomb which had a partially burned wick mixed with fluid containing a white powder or substance. After viewing the bomb, they began to laugh. They acted as if it wasn't dangerous even though they hadn't analyzed it. However, when they went to pick up the bomb, they did it very cautiously with long thong-type holders. I was told by one of the members of the bomb squad that I could get an analysis of the bomb's contents the next day in the downtown office. The next day I went to that office and was informed that the other

gentlemen must have been mistaken because the results wouldn't be known for possibly a month. I went back to the bomb squad office several times after that, the last being in July of 1979. I was informed that the bomb contained some kind of flammable fluid. When I questioned them about the white substance in the bottle, they couldn't answer. When I asked if there were any fingerprints on the bottle, they said none showed up even though one of our employees would have definitely had to put his prints on the bomb in order to pick it off the floor of the second story and set it on the desk. I asked for a report on the results of the testing, and six months after the bombing incident, I still hadn't any results from the Seattle Bomb Squad. This added to my suspicions and fears greatly.

My fears grew more by seeing that we were getting little if any results from the police department in Seattle, Seattle being the place that the threats and nerve shattering events were taking place. There were many other threatening phone calls which took place during my employment at the Aquarian Foundation. Evertime Erik Lacitis would write an article in the *Seattle Times* in reference to the Aquarian Foundation, more of these threats would begin to filter in to the church located at 315—15th Avenue East in Seattle, Washington.

In December of 1979, my fears were strengthened even more. At this time, I became very, very very afraid of even being in Seattle. The incident that took place at that time was the trip to Bogota, Columbia by members of the Aquarian Foundation, including myself. Reverend Rhinehart had been invited to Bogota to a large parapsychological convention. I went on the trip to film both Reverend Rhinehart and the other participants in this so-called large parapsychological convention. It seems as though were were set up in Bogota, Columbia. During one of Reverend Rhinehart's meetings, which was sponsored by a group in Bogota, our meeting was infiltrated by DAS agents, that is the Secret Police in Bogota, Colombia. After the meeting, we were arrested and jailed in the most indescribable conditions that one could imagine. Later I found out that while we were jailed on charges of necromancy and witchcraft, Erik Lacitis of the *Seattle Times*

was again feeding false and evil material about the Aquarian Foundation to the media, thus endangering our lives in Bogota and those of our members throughout the world.

After returning to Seattle, Washington and discovering the slanderous filth fed by Erik Lacitis to KOMO-TV and aired to hundreds of thousands of people, my fears heightened to a point that I felt I would have to leave the city and go into hiding in order to get away from the harassment that was taking place in Seattle towards the Aquarian Foundation. But, before I was even able to leave Seattle again, on February 7, 1980, I received a phone call in the morning from an insane person who was echoing the innuendos that Erik Lacitis and John McCoy had set forth in their libelous articles. He has hollering obscenities over the telephone saying he was going to kill all of us homosexuals and all of us sex deviates and especially Rhinehart.

On that afternoon, a crazy man appeared in front of the Foundation located at 315-15th Avenue East in Seattle, out on a public street, on the sidewalk, with a shot gun. He was hollering all kind of obscenities at the church saying he was going to kill that "queer Reverend Rhinehart and all of the queers inside" and so on and so on. At this time he proceeded to take the shot gun out of the case. He broke it down and loaded it, waving it at the church. He had a member, an older woman, who helped us in cleaning and keeping up the church. She was working downstairs and I was afraid for her life since she was near the front door which had a glass window. I had to go downstairs and walk by this glass window to get her upstairs in case this madman tried to break in or shoot through the door. In the building at that time were six other people approximately. As I walked by the window, this crazy man aimed the shot gun at the glass door. I had to jump back up the stairs in order to avoid being in the line of fire. I did manage to get the lady upstairs and called the police. When the police arrived on the scene, they surrounded this mad man and squatted down behind their cars and told him to drop the shot gun, which he did. They arrested him and took him off—I thought to jail.

When his court case came up, I was called to court to testify. When I arrived at court and his case hearing came before the judge, he was not in court. I found out that he was in a mental hospital and not in jail. It was a further disturbing fact when I found out that he had been released soon thereafter from the mental institution. With the fears growing and mounting with all the disturbance with the slanderous articles coming out in the *Seattle Times* newspaper, with the noncooperation of the Seattle police department and also the intrusion and/or infiltration of the Aquarian Foundation by authorized agents of governmental agencies, my fears were so heightened that I decided to leave town and go into hiding. I did this in February of 1980. For five months, I hid out, doing my church duties at a distance, until it reached a point where I had to come back to Seattle for several weeks in order to effect the transfer of my department to another state and to get my duties caught up on the tremendous work load that has accumulated in order for the Aquarian Foundation to counteract the negative articles published by the *Seattle Times* concerning the church and its members and its founder, Reverend Keith Milton Rhinehart.

I have since left Seattle, the town I love, and I do not know when or if I will be able to return.

---

/s/ ROBERT PLANTE

Robert Plante

(Jurat omitted in printing.)



## APPENDIX Q

## THE SUPREME COURT OF WASHINGTON

98 Wn.2d 226, 654 P.2d 673

[Nos. 47938-1, 48155-5. En Banc. December 2, 1982.]

KEITH MILTON RHINEHART, *et al*, Respondents, v. THE SEATTLE TIMES COMPANY, *et al*, Petitioners.

[1] Discovery—Constitutional Law—Freedom of Press Information Obtained Through Discovery—Protective Order Validity—Factors. CR 26(c), which permits a trial court to forbid publication of information obtained through discovery upon a showing of “good cause”, is constitutional. The First Amendment does not give the news media more right to use information obtained during discovery than any other litigant. To determine if “good cause” exists for a protective order, the court must balance the interests served by protecting the confidentiality of the information (e.g., ensuring the full and truthful disclosure of relevant facts and protecting individuals’ legitimate privacy interests in avoiding unwanted publicity) against the interests served by allowing publication of the information (e.g., informing the public of matters of legitimate public concern) under the circumstances. The trial court’s decision regarding the issuance of a protective order is reviewed for an abuse of discretion.

[2] Discovery—Scope—Effect on Constitutional Rights—Protective Order. The scope of discovery is a matter within the trial court’s discretion. Any adverse impact which disclosure has on individual privacy and association rights may be minimized by issuance of a protective order under CR 26(c). DOLLIVER, J., BRACHTENBACH, C. J., and DIMMICK, J., concur by separate opinion; UTTER and PEARSON, J. J., dissent by separate opinion.

Nature of Action: In an action against two newspapers seeking damages for defamation and invasion of privacy, the plaintiffs refused to disclose certain information requested during discovery.



Superior Court: The Superior Court for King County, No. 80-2-02460-4, Jack P. Scholfield, J., on June 26, 1981, entered an order compelling discovery and a protective order prohibiting the newspapers from publishing the information acquired through discovery.

Supreme Court: Holding that under the circumstances the protective order did not deny the newspapers freedom of the press or freedom of speech and was adequate to safeguard the plaintiffs' privacy and associational interests, the court *affirms* the orders.

*Davis, Wright, Todd, Riese & Jones*, by *Evan L. Schwab* and *Bruce E. H. Johnson*, for petitioners.

*Edwards & Barbieri*, by *Malcolm L. Edwards* and *Robert G. Sieh*, for respondents.

*Gordon G. Conger, Robert B. Mitchell, and Susan D. Jones* on behalf of KIRO, Inc., amici curiae for petitioners.

[As amended by order of the Supreme Court December 13, 1982.]

ROSELLINI, J.—The Seattle Times published stories concerning the Aquarian Foundation and its leader, Rhinehart, who founded the organization in the 1950's. Articles about the foundation, a "spiritualist church", also appeared in the Walla Walla Union-Bulletin, describing some bizarre performances which were presented at a "religious presentation" staged for inmates at the state penitentiary at Walla Walla.

Rhinehart brought this action on behalf of himself and the foundation, seeking damages for defamation and invasion of privacy. He was joined by four members who participated in the Walla Walla presentation.

The defendants denied many of the allegations and asserted affirmative defenses including claims to privilege. They undertook discovery with respect to the plaintiffs' financial affairs, membership and donors. This information was relevant upon the issues of truth and damages. It appears that the attorney for the defendants assured counsel for the plaintiffs that financial materials disclosed to him would be kept confidential. The defendants were provided with income tax returns of Rhinehart and some financial information relating to the other plaintiffs. The plaintiffs refused, however, to disclose other desired information, such as the present address of

Rhinehart, who allegedly had fled the state because of threats to his life resulting from the publicity given the foundation by the defendants.

The defendants sought and were granted an order compelling discovery, and the plaintiffs obtained a protective order limiting the use which could be made of information derived through the discovery process. The order provided:

3. The defendants and each of them shall make no use of and shall not disseminate the information . . . which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.

Clerk's Papers, at 26.

The plaintiffs objected to the order compelling discovery on the grounds that it invaded their right to privacy and freedoms of religion and association. The defendants attacked the protective order on the ground that it denied them freedom of the press and of speech, guaranteed by the first amendment to the United States Constitution and by Const. art. 1, § 5.

The trial court filed a memorandum opinion explaining the protective order. In that opinion it found that the defendants were entitled to make discovery under Superior Court Civil Rule 26(b)(1) and that the plaintiffs had reasonable grounds for the issuance of a protective order in connection with information covered by the order. It also observed that if protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court." The court said:

If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a

result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

Clerk's Papers, at 63.

Both of the court's orders are before us on this discretionary review.

The gist of the defendants' theory in attacking the protective order is that CR 26(c) is unconstitutional insofar as it permits the court to limit the use which the press or its members can make of information which they have received through discovery, upon a mere showing of "good cause".

[1] Under the federal constitution, persons engaged in the business or profession of publishing or otherwise communicating with the public are entitled to no greater protection than citizens who are not so engaged. Their right of access to information within the control of the government is the same. *Houchins v. KQED, Inc.*, 438 U.S. 1, 57 L. Ed. 2d 553, 98 S. Ct. 2588 (1978) (access to jails); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978) (access to tapes not placed in evidence at trial); *Pell v. Procunier*, 417 U.S. 817, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974) (access to prisons and inmates). See *Estes v. Texas*, 381 U.S. 532, 589, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965) (Harlan J., concurring).

Nor is there any basis for holding that a publisher, when he is a party to litigation, enjoys a greater immunity from protective orders than do other litigants, as the defendants would have us hold. Neither the first and fourteenth amendments to the United States Constitution nor article 1, section 5 of our state constitution makes any distinction among citizens in conferring their protections.

Therefore, whatever power the courts have to enter protective orders to forestall the giving of unwanted publicity to the fruits of discovery, that power extends to all litigants.

The defendants maintain that a protective order which forbids publication of matters learned through discovery constitutes a "prior restraint on expression" which, while not unconstitutional per se, bears a "heavy presumption" against its validity. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975). The Supreme Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) indicated that prior restraints "are the most serious and the least tolerable infringement on First Amendment rights." At common law the term "prior restraint" referred to a system of unreviewable administrative censorship or licensing. But the meaning has been extended through a long line of cases beginning with *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931) to include judicial orders having an impact similar to administrative censorship.

The order here does restrain the publication of certain matters, although the restraint as to those items which are later admitted into evidence will terminate at that time. The restraint is not inspired by any governmental objection to the content of the publication, and the subject matter involves no element of advocacy or dissemination of ideas. We would be inclined to the view that these facts should lighten the burden of justifying the restraint. However, the United States Supreme Court has found prior restraints where the only matter involved was evidentiary materials derived from judicial proceedings. See *Nebraska Press Ass'n v. Stuart*, *supra*; *Smith v. Daily Mail Pub'g Co.*, 443 U.S. 97, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979).

We do not believe that the prior restraint doctrine applies to protective orders. We do not reach this issue, however, because even under the prior restraint doctrine protective orders can be justified. Under this doctrine the burden of justifying the restraint rests primarily upon this court, inasmuch as it results from the implementation of CR 26(c), which we have adopted, using the federal rules (Fed. R. Civ. P. 26(c)) as its basis.

We must look then to the reasons for the rule and the nature of the interests involved to see if it is justified.

As the Supreme Court directed in *Nebraska Press Ass'n*, we must also examine whether the order here furthers those purposes and interests, whether other measures would be likely to mitigate the effects of the unwanted publicity involved here; and how effectively the protective order would operate to prevent the threatened harm.

With respect to the possibility of mitigation by other measures, the defendants suggest nothing other than denial of discovery altogether, which is admittedly within the power of the court. Since this would have the effect of closing access to the material sought to be published and denying the defendants the benefits of discovery, it is not a satisfactory alternative. As for the effectiveness of the protective order, it must be assumed that the defendants will abide by the court's order and, as will appear later, the evil against which the rule is directed is a litigant's disclosure of information furnished him in the discovery process. Our main inquiry, therefore, will concern the interests which justify a rule which authorizes protective orders in circumstances such as these. Such orders are meant to protect the health and integrity of the discovery process, as much as to protect the parties who participate in it.

CR 26 pertains to depositions and discovery. At common law opportunities for discovery were limited, as a result of which it was often said that trials were conducted "by ambush". Propounding interrogatories and obtaining documents were not authorized. *State ex rel. Bronson v. Superior Court*, 194 Wash. 339, 77 P.2d 997 (1938); *Puget Sound Nav. Co. v. Associated Oil Co.*, 56 F.2d 605 (W.D. Wash. 1932). Some discovery was allowed in equity, but it did not come into its full flower until the promulgation of the federal rules and the adoption of these rules by the states. It is not disputed that without CR 26 the petitioners would have no right of access to the information which they claim a constitutional right to publish.

CR 26(b)(1) allows a broad scope of discovery, the only restrictions being that the matter must be relevant and not privileged. CR 26(c) provides that upon "good cause shown"



the court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense". There is no dispute that this authorization is broad enough to permit the court to restrain use of discovery information for unauthorized purposes. The purpose of the rule is to enable the parties to prepare their cases for trial.

Chief Justice Warren, in a foreword to W. Glaser, *Pretrial Discovery and the Adversary System* (1968) said:

The pretrial discovery rules have attempted to remove secrecy and surprise from the trial, thus presenting the fact-finder with a less dramatic, but more accurate, presentation of information. Proponents assert that the rules have proved successful in this regard. Yet there has been widespread debate and disagreement about whether the discovery rules, on balance, have improved the adversary system. Critics have doubted whether the benefits have been achieved, and have charged that discovery is unduly expensive and promotes delay and harassment.

It is toward the amelioration of these problems, among others, that CR 26(c), providing for protective orders, was directed. Under this rule the trial court exercises a broad discretion to manage the discovery process in a fashion that will implement that goal of full disclosure of relevant information and at the same time afford the participants protection against harmful side effects. 4 J. Moore, *Federal Practice* ¶ 26.67, at 26-487 (2d ed. 1982). Unfavorable publicity is one of such "harmful side effects". 4 J. Moore, *supra*, ¶ 26.73; *see also* ¶ 26.74.

In *International Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963), the Second Circuit Court of Appeals, speaking through Judge Friendly, said:

[W]e entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publici-



zing, in advance of trial, of information obtained by one party from another by use of the court's processes.<sup>1</sup>

In *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981) (a case in which the parties had consented to a protective order), the Court of Appeals said:

An important purpose of a pre-trial protective order is to preserve the confidentiality of materials which are revealed in discovery but not made public by trial.

As for matters which were admitted in evidence at the trial, however, the court held that the right to publish these, once they had become a matter of public record, was protected by the First Amendment, although the right could be waived. *See also Nichols v. Philadelphia Tribune Co.*, 22 F.R.D. 89 (E.D. Pa. 1958).

*Martindell v. ITT*, 594 F.2d 291 (2d Cir. 1979) was a civil suit in which the federal government attempted to gain access to depositions of witnesses for criminal investigative purposes. Holding that the lower court correctly withheld these depositions in order to protect the witnesses' Fifth Amendment rights and to enforce a stipulation that the information should remain confidential, the Court of Appeals said:

These [the government's] arguments ignore a more significant counterbalancing factor—the vital function of a protective order issued under Rule 26(c), F.R.Civ.P., which is to “secure the just, speedy, and inexpensive determination” of civil disputes, Rule 1, F.R.Civ.P., by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice. Unless a valid

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<sup>1</sup>A more restrictive view was taken by two members of a 3-judge panel of the District of Columbia Court of Appeals in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), strongly relied upon by the defendants here. That case and others which have adopted its holding will be discussed later.

Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.

*Martindell*, at 295-96.

That same court said in *Gallella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) that the grant and nature of protection is singularly within the discretion of the trial court and may be reversed only on a clear showing of abuse of discretion.

In order to prevent the revelation of trade secrets, a court may properly exact from the party seeking this information assurances under oath that none of the information obtained will be divulged except in the course of judicial proceedings. *Paul v. Sinnott*, 217 F. Supp. 84 (W.D. Pa. 1963).<sup>2</sup>

<sup>2</sup> In some areas of litigation, public policy favors public disclosure of information derived in the discovery process. Congress has expressly provided that in the taking of depositions for use in "any suit in equity brought by the United States under sections 1-7 of this title, . . . the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." 15 U.S.C. § 30 (1958). The Ninth Circuit has found this policy applicable to other forms of discovery and in private antitrust suits as well, because "[p]rivate treble-damage actions are an important component of the public interest in 'vigilant enforcement of the antitrust laws'" (citing *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329, 99 L. Ed. 1122, 75 S. Ct. 865 (1955)). *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964).

However, it was held in *D'Ippolito v. American Oil Co.* 272 F. Supp. 310 (S.D.N.Y. 1967) that this statute does not apply to actions commenced by private litigants. And in *United States v. IBM*, 87 F.R.D. 411 (S.D.N.Y. 1980), it was recognized that even where the government brings the action, the public may be excluded under appropriate circumstances and protective orders may be entered.

Thus, the rule has generally been given effect according to the import of its words. The issuance of protective orders is within the discretion of the trial court, to be granted where, in its judgment, good cause exists, having in mind the purpose of the discovery rule to encourage full disclosure of all relevant facts so as to facilitate the administration of justice, acquaint the examiner with the testimony that will be given at trial, develop the truth, shorten and simplify the trial, eliminate elements of surprise, and permit the parties to prepare for trial.

Nowhere in the history of the rules or in the commentaries which we have read upon them can we find any indication that the purposes included that of disseminating to the general public the information derived from discovery, or any suggestion that such dissemination would serve the ends sought to be achieved by the rule. Chief Justice Burger, concurring in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), made this significant observation:

[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories *were other than wholly private to the litigants*. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. . . . In the entire pretrial period, there is no certainty that a trial will take place.

(Italics ours.) *Gannett*, at 396-97.

Nevertheless, within the last few years, there has appeared a line of cases which hold that a protective order forbidding publication of discovery material cannot be entered if the material is of sufficient newsworthiness, unless the court finds that (1) the harm posed by dissemination is substantial and serious, (2) the restraining order is narrowly drawn and precise, and (3) there is no alternative means of avoiding the harm which intrudes less directly on expression.

*In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) is the leading case espousing this doctrine. The defendant in *Halkin* was the United States government, sued by the plaintiffs for invasion of their constitutional rights through unlawful surveillance, occasioned by their opposition to the war in Vietnam. There was no question but that the matters revealed were of public importance, as well as public interest. Here there is no indication that the Aquarian Foundation's activities enjoy a comparable distinction. Nor is the government a party. These facts are sufficient to distinguish *Halkin*. Moreover, we are not convinced that the *Halkin* approach properly serves the administration of justice. As the 2-judge majority did in *Halkin*, we look to the United States Supreme Court for guidance. We are led, however, to a different conclusion.

Why are protective orders needed? There has never been any question but that the individual's interest in commercially valuable information, such as "trade secrets", deserves protection. But the language of CR 26(c) makes it clear that interests other than financial warrant protection under the rule. Protective orders may be entered to prevent "annoyance, embarrassment, oppression, or undue burden or expense".

Implicit in this language is a recognition that by requiring a party to submit to the searching inquiries of discovery, the courts have required him to give information about himself which he would otherwise have no obligation to disclose. A realm of privacy which courts had previously left undisturbed was now opened. True, as to all information derived through these proceedings and admitted at trial, a party's interest in privacy must be sacrificed to the needs of adjudication. But as to other information which he is forced to give under the liberal rules of discovery, the effective administration of justice does not require dissemination beyond that which is needed for litigation of the case. It was the needs of litigation and only those needs for which the courts adopted this rule and demanded of the litigant a duty which would not otherwise be his. For this reason, it is proper that the courts be slow to subject a civil litigant to any exposure which he deems offensive, beyond that which serves the purpose of the rule.

Rights of privacy are established in tort law. *See* Restatement (Second) of Torts §§ 652-652I (1977); *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981). A tort action should not and does not constitute the sole protection which government affords to the privacy interest of individuals. A threatened invasion of those interests may not have all of the characteristics necessary to warrant recovery of damages under existent tort principles and yet be properly a subject of governmental sanction. Numerous statutes of this state provide examples of such intervention.

These include RCW 43.07.100 (information regarding personal affairs furnished to the Bureau of Statistics); RCW 26.26.050 (records of artificial insemination); RCW 71.05.390 (information regarding the mentally ill); RCW 7.68.140 (information regarding records of crime victims). Other statutes protecting confidentiality include RCW 10.29.030(3), RCW 15.65.510, RCW 18.20.120, RCW 18.47.090, RCW 18.72.265, RCW 19.16.245, RCW 24.03.435, RCW 24.06.480, RCW 42.17.310 (the public disclosure initiative lists 11 categories of exempt records, including those containing personal information regarding students, patients, clients, prisoners, probationers, parolees, and information regarding employees, appointees or elected officials, "to the extent that disclosure would violate their right to privacy"), RCW 43.21F.060, RCW 43.22.290, RCW 43.43.856, RCW 43.105.041, RCW 48.13.220, RCW 49.17.200, and RCW 78.52.260.

Federal statutes forbid disclosure except for limited purposes of census information (Census Act, 13 U.S.C. §§ 8, 9, 214 (1954)), data concerning personal lives and business affairs given for purposes of tax collection (Internal Revenue Code, 26 U.S.C. § 6103 (1964)), and disclosure by a federal officer of a wide range of confidential information concerning the operation of businesses (18 U.S.C. § 1905 (1948)).<sup>3</sup>

<sup>3</sup> *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962 (1964). Professor Bloustein, noting the "increasing accumulation of information about each of us which finds its way

(footnote continues)



The "prior restraint" involved in a protective order issued in discovery proceedings is no different in substance from that which is imposed by these statutes. Each protects the confidentiality of information extracted through governmental processes. It is obviously the legislative purpose in enacting these protective statutes, as it was of the Congress and the courts in adopting the discovery rules, to both protect the individual's right of privacy and secure his willing and honest response to the questions asked. In each instance, it is deemed necessary to give the protection in order to achieve the government's objective, whether that be the facilitation of the truth seeking objective in litigation, the imposing of an income tax, care and treatment of the mentally ill, the promulgation of regulations affecting an industry, or other legitimate governmental goal.

We think it safe to say that because of their encroachment upon First Amendment rights of speech and press, if provisions such as these cannot be sustained, the result surely will be a serious undermining of the morale of the people as well as the integrity of government. Provisions such as these, like CR 26(c), express strong governmental policy, designed to protect

*(footnote continued)*

into government records and files", said:

Most of us have agreed . . . that the social benefits to be gained in these instances require the information to be given and that the ends to be achieved are worth the price of diminished privacy.

But this tacit agreement is founded upon an assumption that information given for one purpose will not be used for another. We are prepared to tell the tax collector and the census taker what they need to know, but we are not prepared to have them make a public disclosure of what they have learned. The intrusion is tolerable only if public disclosure of the fruits of the intrusion is forbidden. This explains why many of the statutes which require us to tell something about ourselves to a government agency contain an express provision against disclosure of such information. It also explains why there are general provisions prohibiting disclosure of information of a personal nature gained in an official capacity.

(Footnotes omitted.) Bloustein, *supra* at 999.



valuable rights of private individuals as well as to further legitimate interests of the state. The court's endeavor should be to uphold such measures if possible, if it can be done without unduly invading some other protected right. A persuasive argument can be made that when persons are required to give information which they would otherwise be entitled to keep to themselves, in order to secure a government benefit or perform an obligation to that government, those receiving that information waive the right to use it for any purpose except those which are authorized by the agency of government which exacted the information.<sup>4</sup> However, because the United States Supreme Court has been reluctant to find waiver in First Amendment cases, we do not pursue that theory but confine ourselves to the question whether the "heavy burden" of justifying the restraint has been sustained in the circumstances of this case.

It is not alone in the area of tort law or statutory enactment that rights of privacy have been acknowledged. The United States Supreme Court both in majority and minority opinions has exhibited increasing awareness and appreciation of these important adjuncts to freedom.

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<sup>4</sup> The Supreme Court has said that waivers of First Amendment rights are to be inferred only in "clear and compelling" circumstances. *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 145, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). Also in *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), the Court found that denial of tenure to a teacher had been caused by his advocacy of positions contrary to those of his employers and held that a benefit such as employment could not be conditioned on a waiver of constitutional rights.

We find it difficult to conceive of circumstances more "clear and compelling" than those involved here. Parties seeking to utilize the processes of discovery necessarily acquaint themselves with the rules which attend that process. They know the purposes for which discovery is intended, and that protective orders can be entered in the discretion of the court. Attorneys are surely aware that it is improper to exploit the fruits of discovery by using them for other than authorized purposes. It is true that no penalty can attach for such use if a protective order is not obtained; but it is understood in the majority of cases that confidentiality will be respected, thus removing the necessity of seeking such an order to protect against unwanted publicity.

In the case of governmental employees and officials, it is also presumably made clear to them upon assuming their duties that information obtained in the course of their duties from private persons is to be kept confidential.

Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564, 66 A.L.R. 376 (1928), said:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

In *Time, Inc. v. Hill*, 385 U.S. 374, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967), Justice Fortas (joined by the Chief Justice and Justice Clark), dissenting, said:

There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court. . . . It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law. As Mr. Justice Brandeis said in his famous dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), the right of privacy is "the most comprehensive of rights and the right most valued by civilized men."

. . . As stated in the concurring opinion of Mr. Justice Goldberg, with whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN joined: "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" [*Griswold v. Connecticut*, 381 U.S. 479, 494 (1965)].

(Footnotes omitted.) *Time, Inc.*, at 412-14.

*Time, Inc.* was a case in which the plaintiffs sought damages for invasion of their privacy through publication of a story falsely declaring that they had been involved in an encounter with convicts similar to the one then being portrayed in a stage play in New York. The Court held that Times, Inc., could be held liable only if the story was printed recklessly or with knowledge of its falsity.

Since the decisions in that case and *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971) (extending the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964) to matters of general or "public interest" as well as public officials and public figures), the high Court has begun to take a more sympathetic view of the rights of persons who are the victims of publicity. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977) (a television station owner may not appropriate an individual's entertainment act); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) (an attorney, even though he has gained a reputation in the community, is a private individual and does not have to meet the *New York Times* standards of proof in pursuing a libel action). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), the Court took note of the fact that there is, in this century, "a strong tide running in favor of the so-called right of privacy" and said that powerful arguments can be made that there is a zone of privacy surrounding every individual, a zone within which the state may protect him from intrusion by the press, with all its attendant publicity. There, a damage action was brought, relying upon a Georgia statute which made it a misdemeanor to broadcast a rape victim's name. The Court upheld the broadcasting company's right to announce the name in that case, because it appeared in the records of the court, which were open to the public. It said that the state may not impose sanctions on the publication of truthful information contained in official court records open to public inspection. However, the

Court did not suggest that all judicial proceedings are necessarily public. On the contrary, it said:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weight the interests in privacy with the interests of the public to know and of the press to publish.

(Footnote omitted.) *Cox Broadcasting Corp.*, at 496.

In a footnote, the Court said that it was not implying anything about constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.

These two statements taken together strongly suggest that the Court was aware of the overriding necessity for the protection of privacy interests in certain governmental contexts—such as those involved in discovery proceedings and the various situations covered by the statutes we have cited earlier.

The Supreme Court has recognized privacy claims in *Carey v. Population Servs. Int'l*, 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); and *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). And in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958), the Court gave strength to the individual's freedom of association, which is one of the attributes of the interest in privacy. There an attempt on the part of the State to require the NAACP to disclose its membership lists was rebuffed. The Court said: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association". *NAACP*, at 462.

Thus we have seen that the courts, in promulgating the rules of discovery, were aware that by allowing liberal dis-

covery, with inquiries into matters which would not necessarily be introduced or admissible at trial, they were permitting invasions of a litigant's private domain and were rightly concerned that he should be protected against abuse of the discovery process.

Protection against use of materials for publicity purposes has most frequently been achieved by limiting the parties in attendance at a deposition and ordering the deposition sealed until further order of the court. 4 J. Moore, *Federal Practice* ¶ 26.74 (2d ed. 1982).

Cases involving a claim of constitutional right to publicize the results of discovery appear to be recent phenomena.

Among those courts which have been called upon to consider the proposition, we have been surprised to find some which have summarily held that the right to publish is paramount, without giving any attention to the needs of judicial administration, or the interests of litigants. These include *Georgia Gazette Pub'g Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981), reversing a thoughtful opinion of the superior court judge. That judge did not reject *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), but found all of its requirements satisfied, essentially upon the basic principle that giving publicity to discovery materials does not serve the fair administration of justice. The judge pointed out that a protective order would help ensure a fair trial in the civil case and in any possible criminal proceedings which might be brought against the plaintiff.<sup>5</sup>

The Georgia Superior Court also took notice of the plaintiff's privacy interests and the exploitation which was within the power of the defendant as a publisher of newspapers.

Unfortunately, the Supreme Court of Georgia paid no heed to these considerations, but held without discussion that the provision of the state constitution guaranteeing freedom of the press was decisive of the issue. Inasmuch as the court

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<sup>5</sup> This was an action for invasion of privacy based on a story about the plaintiff, a dentist, as a prime suspect in the investigation of a crime.



ignored the objectives and needs of judicial administration, as served by the discovery rules or the interests of litigants, we do not find that opinion persuasive.

In contrast is the approach of Mr. Justice Rehnquist, concurring in *Smith v. Daily Mail Pub'g Co.*, 443 U.S. 97, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979). He cited *American Communications Ass'n v. Douds*, 339 U.S. 382, 394, 94 L. Ed. 925, 70 S. Ct. 674 (1950), where the Court had said: "Freedom of speech . . . does not comprehend the right to speak on any subject at any time", and also quoted from *Branzburg v. Hayes*, 408 U.S. 665, 683, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), "the press is not free to publish with impunity everything and anything it desires to publish." Rehnquist said that conflicting interests must be weighed. He would make it clear that the protection of a juvenile's reputation is a state interest of the highest order, but agreed with the result reached in *Smith* because the statute did not achieve its objective.

In *New York Press v. McGraw-Hill*, 4 Media L. Rep. 1819 (N.Y. App. Div. 1978), the appellate division of the New York Supreme Court, in a business defamation action against a publisher, held that the absence of a showing that the defendant's use of material and information obtained during discovery would seriously harm the plaintiff, or to show that such material was confidential, justified the New York Supreme Court (trial court) in refusing to grant a requested protective order. That court was of the opinion that the news media, even when a party to the action, had a right to gather news at a discovery proceeding and publish it, and that the right should not be interfered with except under the most extreme circumstances. We do not share that view.

The Florida Circuit Court for the Seventeenth Judicial Circuit, Broward County, denied a motion to exclude the press and public from discovery proceedings in *Johnson v. Broward Cy.*, 7 Media L. Rep. 2125 (Fla. Cir. Ct. 1981). It appears from the opinion that under Florida law depositions are generally open to the public. That is not the case in this state.

*Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977) was a damage action brought by an insurance company against a well known financial magazine and one of its



contributors, a professor of accountancy. Before discovery began, the plaintiff asked for what the district judge termed "the customary pre-trial stipulation and order of confidentiality, limiting pre-trial use of such material to matters pertaining to this action." *Barron's*, at 202. The plaintiff specifically asked that no other uses be made of nonpublic information obtained pursuant to the discovery proceedings. The defendants declined to so stipulate and the court refused to enter a protective order, finding first that the plaintiff had failed to show that it "[would] indeed be harmed by disclosure." *Barron's*, at 204, quoting from *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 409 (N.D.N.Y. 1973). But the court said that it would be inclined to issue the order if the defendants were not members of the press. It held that to restrain them from publishing information gained through discovery proceedings would constitute a "prior restraint", and that to justify such an order the plaintiff was required to demonstrate that the material to be restrained was, indeed, confidential and that its publication would cause plaintiff to suffer serious and irreparable injury.

For this proposition, the court cited only *New York Times Co. v. United States*, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971), and that not as direct authority but as a comparable case. However, *New York Times* had nothing to do with the discovery process. It was an injunction suit brought by the United States against a newspaper to restrain publication of materials concerning government policy, which were, of course, of great interest to the public.

The district court in *Barron's* assumed that members of the media, when in court, have rights superior to those of other parties. This, as we have observed, is not a valid assumption.

In *Koster v. Chase Manhattan Bank*, 8 Media L. Rep. 1155 (S.D.N.Y. 1982), the United States District Court for the Southern District of New York wrote a scholarly opinion reviewing the history and nature of the discovery process in the courts, their holdings with respect to the limited First Amendment interest that litigants have in disseminating information learned through discovery, and the conflicting views which courts have expressed as to the standards to be used in

evaluating protective orders restricting dissemination. The court took cognizance of the fact that the nature of discovery makes it unfair to allow the recipient of discovery materials an unlimited right to disseminate those materials. It indicated approval of the views of Wilkey, J., dissenting in *In re Halkin, supra*, who said that a litigant accepts the materials produced through discovery subject to the possibility that the court may restrict their use.

The court in *Koster* also noted the developing controversy regarding the standard which should be used to test the validity of a protective order. But having made all of these observations it avoided adoption of any standard by holding that, under the most lenient, the defendants had not shown good cause to issue a protective order. This opinion illustrates the difficulties which the trial courts create for themselves when they attempt to enunciate restrictive criteria for the exercise of their discretion.

At least two federal courts have made that attempt, the District of Columbia Court of Appeals in *In re Halkin, supra*, and the First Circuit Court of Appeals in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981).

The 2-judge majority in *Halkin*, while not willing to go so far as to declare a protective order to be a "prior restraint" on freedom of expression, as that term is generally understood, found that it did involve "First Amendment interests". *Halkin*, at 191. In that case the subject matter of the discovery process constituted material of considerable legitimate interest to the public.

The protective order concerned certain documents relating to government surveillance of opponents of the war in Vietnam and other political activities. The documents had been purged of all sensitive matters before being handed over to the plaintiffs pursuant to discovery requests. No protective orders were sought until after the documents were in the hands of the plaintiffs and they proposed to release some of the documents to the press. The government claimed that public disclosure of these documents would be "prejudicial to the defendants' right to adjudication of the issues in this civil action in an

uncolored and unbiased climate, including a fair trial.' " *Halkin*, at 181-82. The trial court issued the order, apparently considering it routine.

The Court of Appeals, noting that the case would be tried to the court rather than to a jury, found these allegations inadequate to support the order.

In *Halkin* there were no rights of privacy to be protected by the order. The Court of Appeals, not content to merely hold that the court had abused its discretion under the circumstances of the case, devised a set of standards which could hardly be more onerous, had the court found the "prior restraint" doctrine applicable.<sup>6</sup>

The parties objecting to a protective order in *San Juan Star* were not litigants but rather were members of the media who desired to obtain information from attorneys who were subject to such an order. The First Circuit Court of Appeals gave much more weight than did the *Halkin* court to the litigant's right to privacy and to the effect of publicity upon the proper functioning of the discovery process. Nevertheless, the court, rather than permit the lower courts to continue to function under the rule as it is presently worded, conceived a set of criteria for determining whether a protective order should issue. These criteria were somewhat less stringent than those

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<sup>6</sup> The court said:

"Initially, the trial court must determine whether a particular protective order in fact restrains expression and the nature of that restraint. First Amendment interests will vary according to the type of expression subject to the order. An order restraining publication of official court records open to the public, or an order restraining political speech, implicates different interests than an order restraining commercial information. The interests will also vary according to the timeliness of the expression. An order restraining highly newsworthy information raises a different issue than a temporary restraint of materials having 'constant but rarely topical interest.'

"The court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." (Footnotes omitted.) *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979).

adopted in *Halkin*, but would nevertheless impose an added burden upon the trial court in determining whether to issue the protective order. The court characterized its standards as one "of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake". *San Juan Star*, at 116.

In our view, the procedures adopted by these courts for the promulgation of protective orders and the criteria for review of those orders are unduly complex and onerous and tend to undermine the objectives of pretrial discovery, which is designed to expedite rather than to hinder the progress of litigation. We do not find them mandated in the decisions of the United States Supreme Court which bear upon this subject.

We observe that the Supreme Court, in cases where it has been called upon to examine the reach of First Amendment protections, has generally taken cognizance of the function which publicity serves in the particular circumstances. For example, in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931), cited in *Halkin*, a newspaper, which was found objectionable because of the scandalous charges which it contained within its covers, had been abated. The Court, reversing, stressed the fact that the published charges were made against public officials, that for 150 years there had been almost an entire absence of attempts to restrain publications relating to malfeasance of public officers, indicating a deep-seated conviction that such restraints would violate constitutional rights, and that the growing complexity of society and the prevalence of organized crime in large cities made a vigilant press all the more necessary.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971), the Court reversed an injunction directed against the distribution of leaflets (evidently racist in their content).

These cases are concerned with rights of advocacy, and the dissemination of ideas, which lie at the core of First Amendment protection. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978). There is no advocacy or abstract discussion involved here—only the reporting of supposed facts elicited in discovery.

The rationale of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975) is significant here:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See *Sheppard v. Maxwell*, 384 U. S. 333, 350 (1966).<sup>7</sup>

In answer to the respondent's contention that the efforts of the press had infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim, the Court said that the commission of crime, prosecutions resulting from

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<sup>7</sup> Cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) where it was held that the United States Constitution does not give the public an affirmative right of access to a pretrial hearing, if all the participants agree that it should be closed to protect the fair trial rights of the defendant. The Court said that publicity concerning pretrial suppression hearings poses special risks of unfairness because it may influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

The Court also said that the adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation. It said that at common law pretrial proceedings, because of the concern for a fair trial, were never characterized by the same degree of openness as were actual trials.



it, and judicial proceedings arising from the prosecutions thereof are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), a case in which the Court upheld the right of the press to attend criminal trials, Justice Brennan pointed out principles which are relevant in weighing the interest of the media in access to governmental proceedings. He said:

An assertion of the prerogative to gather information must . . . be assayed by considering the information sought and the opposing interests invaded.

. . . [T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Cf. *In re Winship*, 397 U. S. 358, 361-362 (1970). Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is *important in terms of that very process*.

(Footnote omitted. Italics ours.) *Richmond Newspapers*, at 588-89.

Thus, it is evident that the Court's concern for the protection of First Amendment rights, at least insofar as access to governmental processes is concerned, increases in proportion to the intensity of the legitimate interest which the public has in learning about those processes. The conduct of public officials and the proceedings at trial are of vital concern to the people, the one because of their interest in the public functions which



these officials perform and in their integrity, ability and diligence, and the other additionally, because of their interest in seeing that constitutional rights are protected and justice done. The need for information upon these matters is engendered by the rights and responsibilities the citizen has in choosing those who will govern him and administer justice and in pursuing the changes in law which will correct the inadequacies which he may find in the functioning of his government.

A case which is of particular significance here is *Landmark Communications, Inc. v. Virginia*, *supra*. There, a statute made it a crime to divulge information regarding proceedings before a state judicial review commission. For printing in its newspaper an article accurately reporting on a pending inquiry by the commission and identifying the judge whose conduct was being investigated, the appellant publisher was convicted of violating the statute.

The Court held that the First Amendment does not permit the *criminal punishment of third persons who are strangers* to proceedings before such a commission, for publishing or divulging truthful information regarding confidential proceedings of the commission.

No reporter, employee, or representative of Landmark had been subpoenaed by or had appeared before the commission in connection with the proceedings described in the article.

In reaching its conclusion that the conviction violated the defendant's First Amendment rights, the Court took care to note that the case did not involve a constitutional challenge to the State's power to keep the commission's proceedings confidential or to punish participants.

The Court cited *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434 (1966) where it had said that, whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. The operations of courts and the judicial conduct of judges are matters of utmost public concern.

It quoted from *Sheppard v. Maxwell*, 384 U.S. 333, 350, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966):

A responsible press has always been regarded as the handmaiden of effective judicial administration . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

It found that the operation of the judicial inquiry commission was a matter of public interest, necessarily engaging the attention of the news media. The article published provided accurate factual information about a legislatively authorized inquiry pending before the commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.

Recognizing that the confidentiality of the proceedings served legitimate state interests, the Court nevertheless found those interests insufficient to justify criminal sanctions for publication, *when imposed upon nonparticipants*. It noted that a number of states punished breaches of confidentiality by participants through contempt proceedings, and that more than 40 states having similar provisions did not find it necessary to provide criminal sanctions.

It observed that protection of the reputation of judges and the judicial system was not a sufficient ground for the sanction—judges and the court system are no more immune from scrutiny and criticism than other public officials.

Finally, the Court in *Landmark Communications, Inc., v. Virginia*, *supra* at page 845, said that much of the danger to the administration of justice posed by publicity could be eliminated through "careful internal procedures to protect the confidentiality of Commission proceedings."

We find implicit in this opinion a recognition that there are governmental proceedings which legitimately may be closed to the public and the press, and the State may punish those participating in such proceedings if they disobey an order to keep them confidential. *See also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n.21, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981), where the Court said:

In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors. Our decision regarding the need for careful analysis of the particular circumstances is limited to the situation before us—involving a broad restraint on communication with class members [in a Civil Rights Act class action, 42 U.S.C. 2000 *et seq.*]. We also note that the rules of ethics properly impose restraints on some forms of expression. *See e.g.*, ABA Code of Professional Responsibility, DR 7-104 (1980).

We have seen that in *Gannett v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), it was held that, in order to protect the right of a defendant to a fair trial, the court may close a preliminary hearing to the public and the press. We find implicit in that holding a recognition that when a hearing is closed, the court may properly restrict the use which participants in the hearing may make of information gained in that proceeding, forbidding its disclosure to members of the public, including the media. That being the case, there is no sound reason why the same restrictions may not be imposed in discovery proceedings.

To begin with, the public generally does not have the same interest in the conduct of civil actions that it has in criminal actions, for the public is a party to a criminal action, the plaintiff being the state or other governmental body. Also, the functioning of the adversary system plays an important role in avoiding abuses in civil proceedings. With respect to discovery proceedings, the strong governmental interest in effectuating the purposes of those proceedings makes it imperative that their integrity be preserved. Essential to that integrity is the protec-

tion of the party against whom discovery is sought from unnecessary "annoyance, embarrassment, oppression, or undue burden or expense". CR 26(c). Such protection must include protection of a party's privacy interest in avoiding unwanted publicity. This objective serves not only the State's interest in protecting its citizens in their legitimate expectations of privacy, but also, and perhaps more importantly, the State's vital interest in seeing that justice is administered upon all of the relevant facts, freely and truthfully disclosed by the parties.

Inherent in CR 26(c), providing for protective orders, is a recognition that parties generally are not eager to divulge information about their private affairs and, that when called upon to do so in a lawsuit, will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation. Many will be tempted to withhold information and even to shade the truth, where otherwise they would not do so. And, as the trial court rightly observed, rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.

It is perhaps a matter of speculation as to what the effect will be in any given case. However, that which concerns us is the cloud which will be cast upon the integrity of the discovery process if the courts permit such intrusions.

As compared with the interests served by the rule, the interest of the public in knowing what information is given in such proceedings is, in the ordinary case, minimal. Of course, there are cases which involve matters which do concern the public generally (antitrust litigation being an example), and where privacy interests are not involved, there may be good reason to deny a protective order. In such cases, the tendency to undermine confidence in the integrity of the process may be negligible, and the objecting party may have difficulty in showing good cause, as was the case in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

It does not seem likely that, where a matter is considered newsworthy, the media will be without its own means of investigating the facts. In the present case, it is evident from the record that the defendants had obtained access to a sufficient amount of information about the plaintiff and his organization to produce a vivid series of accounts about their activities.

We are not told what interest of the public is served by the newspaper's further exposure of this allegedly religious sect,<sup>8</sup> unorthodox though it undoubtedly is, but we assume that publishers could rightly find it newsworthy. It may have some significance with respect to governmental activity, but, if so, that fact has not been brought to light. If the plaintiff and his associates are engaged in unlawful activities, it is safe to assume what with the exposure that has already been made, the appropriate law enforcement agencies will take action. In view of the fact that the discovery rules have a long history of functioning without exposure of litigants to unwanted publicity and at the same time the news media has flourished, giving extensive coverage to the bizarre and the unorthodox, we do not perceive that continued protection of the discovery proceedings will constitute a substantial impediment to news gathering in this area.

As the Supreme Court has more than once remarked, the function of the media in serving not only the public's need to know but the integrity of governmental functions themselves is of great importance in balancing First Amendment rights against other interests of the state. Here, there is nothing to indicate that publicity given to the evidence furnished by a party in a pretrial proceeding will in any way tend to promote the proper functioning of such proceedings. There is involved here no evaluation or criticism of judges or other officials administering the system nor of the system itself, but only a

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<sup>8</sup> "A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; . . . [and] the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." (Footnote omitted.) See *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981).



proposal to exploit the fruits of that system. Thus, this vital consideration which has sometimes led the courts to favor the interests of speech and press over the rights of a defendant in a criminal trial are entirely absent.

Assuming then that a protective order may fall, ostensibly, at least, within the definition of a "prior restraint of free expression", we are convinced that the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the "heavy burden" of justification. The need to preserve that integrity is adequate to sustain a rule like CR 26(c) which authorizes a trial court to protect the confidentiality of information given for purposes of litigation.

The rule itself imposes no affirmative obligation upon a participant to refrain from giving publicity to information derived in a discovery proceeding. However, as Chief Justice Burger has remarked, it has customarily been taken for granted that such information is given solely for purposes of litigation. It is evident that the rule contemplates that participants will not abuse the process, but if they do attempt or propose to do so, the party against whom such action is directed may apply for protection. Our understanding of the rule, contrary to that of the federal circuit courts in *In re Halkin, supra*, and *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), is that "good cause" is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process. In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. The judge's major concern should be the facilitation of the discovery process and the protection of the integrity of that process, which necessarily involves consideration of the privacy interest of the parties and, in the ordinary case at least, does not require or condone publicity.

Here, there is no question but that the defendants were threatening to publicize the information which they gained through the discovery process. They insist upon their right to do so. The information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had a recognizable privacy



interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression.

Of course, by undertaking the lawsuit the plaintiff necessarily consented to the exposure of all relevant evidence admissible and admitted at trial, which will then be a matter of public record and available for publication by the defendants or any other person. But until and unless the fruits of the discovery are made public through the judicial process (or by the plaintiffs or others independently of discovery),<sup>9</sup> plaintiffs are entitled to the protection of the court.

We find no abuse of discretion and affirm the issuance of the protective order.

[2] Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and

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<sup>9</sup> The defendants express some concern that the protective order is too broad in that it does not make it clear that the defendants may publish the information if it is revealed in open court or otherwise made public by the plaintiffs. This may be an unnecessarily strict construction of the order; but to remove any doubt, the defendants should apply to the court to clarify the order, consistent with this opinion.

find none which supports the theory in the circumstances of this case. All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

With respect to this order, also, we find no abuse of discretion.

The orders are affirmed.

BRACHTENBACH, C.J., and STAFFORD, WILLIAMS, and DORE, JJ., concur.

DOLLIVER, J. (concurring)—Although I agree with the result reached by the majority, I believe the court should state categorically that discovery under the standards of CR 26(c) and the protective orders of the court in this case do not require a First Amendment analysis. The United States Supreme Court has wisely avoided the morass of rather tendentious First Amendment commentary which has afflicted some of the federal courts in recent cases. *E.g.*, *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). We should do the same. I agree with the comment of the majority that "we are not convinced that the *Halkin* approach properly serves the administration of justice." Majority opinion, at 236. To this I would add it also does little to advance the cause of First Amendment protections. *See International Prods. Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963).

In his dissent to *In re Halkin*, Judge Wilkey states with great clarity why a protective order such as in this case is not an assault on the Bill of Rights:

Within the framework of the discovery laws, then, it is clear that whatever rights a party may have in the materials that it has exacted from another party in discovery are qualified by conditions properly imposed by the court in its discretion under Rule 26(c). There is no "waiver" of First Amendment

rights, as the majority tries to term it; it is simply that when a party uses the court's process in a manner which may be unfair to the other party and is unrelated to the litigation purpose of discovery, the court has the power and responsibility to take whatever action is necessary to protect its process from abuse, and a protective order requiring a litigant to use the products of discovery in a manner consistent with the purposes of discovery is a permissible "prior restraint" if it meets the standards set forth in Rule 26(c).

The majority argues that revelation of governmental action which sometimes accompanies civil litigation should not be kept from the public. Of course, this material on which petitioners wish to hold a press conference now *will* be made public at the trial. Even matter which has been discovered, but which may not be deemed relevant to issues at trial, can later be fully disclosed and discussed, as I understand the purpose and tenor of the trial court's order. No suppression of free speech is involved in this case; what is at issue is the orderly control of the judicial process by the trial judge.

This is illustrated by the striking anomaly in the majority opinion's logic which the majority does not adequately explain. It is conceded "that plaintiffs do not have a First Amendment right of access to information not generally available to members of the public. *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609-10, 98 S.Ct. 1306 [1318], 55 L. Ed. 2d 570 (1978)." Federal Rule of Civil Procedure 26(c)(1) allows the district court to prevent discovery altogether, if good cause is shown ("may . . . order . . . that the discovery not be had"). No one argues that such prohibition raises any First Amend-

ment issues or problems, and apparently it is conceded by all that such an order may be based on mere "good cause," and the district court need not meet any more stringent test such as "reasonable likelihood of harm" or "serious and imminent threat," etc., before it can issue such an order. However, the majority holds that when a *less serious* intrusion of the district court is made, *i.e.*, it attempts to set limits on the use of the information already received, it must meet *more stringent* First Amendment standards.

Thus the anomalous situation results, in which the district court is completely unfettered by First Amendment considerations when it is most intrusive, *i.e.*, prohibits discovery altogether, and is more restricted when it is less intrusive, *i.e.*, puts limits on the use of material which it allows to be discovered. This has nothing to do with any "benefits-privileges" analysis, as the majority interprets my position (note 28). It is simply the principle that the greater (the power to prohibit altogether) includes the lesser (the power to grant with conditions), a bit of logic which has been recognized as valid as least since the ancient Greeks.

It seems to me, then, that the majority's elaborate First Amendment analysis is gratuitous. Since an order properly issued under Rule 26(c) is constitutional, the focus of inquiry should be whether or not "good cause" has been shown for the order under review within the meaning of Rule 26(c). If the district court properly issued the order under Rule 26(c), then the order is consistent with First Amendment safeguards, and there is no reason to embark on an independent First Amendment analysis. If the district court did not properly issue the order under Rule 26(c), then it is violative of statutory standards, and there is again no reason to embark on a First Amendment analysis.

(Footnotes omitted.) *In re Halkin*, 598 F.2d at 208-09.

I concur with the view of Judge Wilkey. Subjecting the discovery process to the strictures of the First Amendment may increase trial courts' reluctance to allow discovery in the first place. Trial judges who fear the impairment of their ability to regulate abuses once the discovery process has started may resort to the more easily justified but more drastic alternative of denying discovery altogether. The analysis represented by the *In re Halkin* majority and by the dissent here neither advances the administration of justice nor guarantees any rights contained in the First Amendment.

BRACHTENBACH, C.J., and DIMMICK, J., concur with DOLLIVER, J.

UTTER, J. (dissenting)—I must dissent because I cannot agree with the majority's analysis. While purporting to apply the doctrine of prior restraint to this case, the majority's ruling for all practical purposes makes discovery a category exempt from First Amendment scrutiny. I would vacate the existing protective order and remand for reconsideration in light of the guidelines set forth in this opinion. First Amendment interests must be balanced against legitimate concerns for the administration of the discovery process, with the ultimate burden of justification resting with the party seeking the restraint.

The majority opinion expresses doubt as to the applicability of the prior restraint doctrine with respect to discovery protective orders, majority at 231, but nevertheless finds CR 26(c) justified even under the "heavy burden", majority at 239, imposed under the prior restraint doctrine. While voicing adherence to the prior restraint doctrine, the majority's analysis reflects more its initial skepticism as to the doctrine's application. That skepticism is warranted but that does not mean First Amendment interests need not be carefully balanced in issuing protective orders. By failing to apply in earnest the traditionally stringent standards of prior restraint, the majority both dilutes the future value of the doctrine in a proper context and neglects the primary duty of the court in this case: establishing the appropriate standard by which trial courts may issue protective orders without violating the requirements of the constitution.



## I

The thrust of the majority's analysis is that the court need not reach the question of whether the prior restraint doctrine applies to protective orders because even under the heavy burden of that doctrine, "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification." Majority at 256. Since, under the majority's analysis, CR 26(c) is justified even under the stringent prior restraint test, protective orders may be justified on a showing of good cause which the majority defines as a showing of any enumerated harm threatened that "can be avoided without impeding the discovery process." Majority at 256. While I agree with the majority that the interests it identifies are important factors to weigh in determining whether a protective order should issue, such interests do not exempt from First Amendment analysis the many situations that arise under the rule. While purporting to hold CR 26(c) is a justified prior restraint, the majority's position is actually tantamount to holding discovery is an excepted category from First Amendment scrutiny—a position unsupported in the law. *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), cert. denied, 420 U.S. 969 (1975); *In re Halkin*, 598 F.2d 176, 186-87 (D.C. Cir. 1979).

Prior restraints are permitted only in the most exceptional cases. *United States v. The Progressive, Inc.*, 467 F. Supp. 990, reconsideration denied, 486 F. Supp. 5 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights". *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). The Supreme Court has described the doctrine as "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart*, supra at 562. There is a heavy presumption against the constitutionality of prior restraints. To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition against



prior restraints . . ." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975).

[The] publication [sought to be restrained] must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . .

*New York Times Co. v. United States*, 403 U.S. 713, 726-27, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971) (Brennan, J., concurring). Even when the prior restraint is imposed to protect a "vital constitutional guarantee . . . the barriers to prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Ass'n v. Stuart*, *supra*, at 570. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971); *Carroll v. President & Comm'rs*, 393 U.S. 175, 21 L. Ed. 2d 325, 89 S. Ct. 347 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 9 L. Ed. 2d 584, 83 S. Ct. 631 (1963); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931); *Seattle v. Bittner*, 81 Wn.2d 747, 505 P.2d 126 (1973); *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958).

Yet faced with this almost insurmountable hurdle, the majority holds protective orders and the multitude of situations under which they might arise are justified as long as a threatened harm can be shown and the protective order will not impede discovery. Had the majority actually applied the traditional doctrine of prior restraint, neither CR 26(c) nor the protective order in this case would have withstood the constitutional test. Even constitutional concerns for privacy do not rise to the level of overcoming the presumption of unconstitutionality attached to prior restraints. *Organization for a Better Austin v. Keefe*, *supra* at 418-20.

## II

The protective order's invalidity under the traditional prior restraint test should not resolve this case. While some First Amendment interest does attach to the dissemination of dis-

covery materials, I feel in this context the heavy burden of the prior restraint doctrine is inappropriate. *But see Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977); *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972).

As a general proposition, pretrial discovery is public unless compelling reasons exist for denying the public access to the proceedings. *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979); *United States v. IBM Corp.*, 66 F.R.D. 219 (S.D.N.Y. 1974); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973). An individual is entitled to use the fruits of discovery for lawful purposes unless a protective order issues. *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955). While courts have diverged as to the appropriate constitutional standard, there has been little dispute as to the existence of a First Amendment interest in discovery materials. *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981); *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); *In re Halkin*, *supra* (majority and dissent concurring on this point); *Koster v. Chase Manhattan Bank*, 8 Media L. Rep. 1155 (S.D.N.Y. 1982); Note, *Protective Orders Prohibiting Dissemination of Discovery Information: the First Amendment and Good Cause*, 1980 Duke L. J. 766 (hereinafter Duke Note); Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645 (1980) (hereinafter Columbia Note). *But cf. Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976) (considering such First Amendment interest waived); *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (court entertained no doubt of constitutionality of protective orders, though it did not deny the existence of First Amendment interests).

Nonetheless, I feel there are factors that distinguish the restraint of a protective order from the prior restraints that have traditionally been accorded such a heavy presumption of invalidity. A protective order is a restraint on expression but "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957)

(Frankfurter, J.). See generally Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539 (1977). Protective orders are unlike classic prior restraints (e.g., administrative licensing schemes) in that they result from an adversary process and can be limited to specific expression. *In re Halkin*, 598 F.2d at 185 nn. 16-17. More importantly, protective orders relate only to material gathered by virtue of the court's processes. As the court in *Koster v. Chase Manhattan Bank*, 8 Media L. Rep. 1155, 1159 (S.D.N.Y. 1982) stated: "[T]he special nature of discovery as a source of information justifies a reduced level of scrutiny." As Judge Wilkey in his dissent to *Halkin* stated, one's interest in disseminating discovery materials is restricted because it is obtained solely by virtue of the court's processes. 598 F.2d at 206. Judge Wilkey concluded that since a court can deny access to discovery altogether without being subject to First Amendment analysis, it is anomalous to make protective orders subject to such First Amendment strictures. Applying the logical construct that the greater includes the lesser, Judge Wilkey concluded the greater power of denying access includes the lesser power of placing restrictions on access, and that both should be subject to the same standard.<sup>10</sup> The notion is plausible, but unfortunately deductive logic is a helpful but not necessarily dispositive aspect of legal analysis. See R. Wasserstrom, *The Judicial Decision*, ch. 2 (1961). The greater does not always include the lesser when it is a constitution and not a syllogism we are expounding. While an individual does not have a right to public employment, the government may not place unconstitutional conditions on such employment:

[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech. For if the government could deny a benefit to a

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<sup>10</sup> The majority, too, seems persuaded by the same argument. See its discussion of *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) at page 253. For the same reasons discussed in text, I find its analysis unpersuasive.

person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

*Perry v. Sindermann*, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). See *In re San Juan Star Co.*, *supra* at 114; Duke Note at 789-90; Columbia Note at 1647 n. 16. Thus, if the court's reason for denying a party access to discovery was to deny the party a First Amendment interest in dissemination of those materials, such denial would be just as invalid as a protective order motivated by similar concerns. Judge Wilkey's affirmation of the highly discretionary good cause standard as a basis for denial of both access and protective orders, while logically plausible, does not follow inevitably from a constitutional analysis.<sup>11</sup>

First Amendment concerns persist even though protective orders should not be subject to a heavy presumption of unconstitutionality. In so concluding, I fall in line with the majority of courts that have considered the question. See *Koster*, *supra* at 1158-59 (and cases cited therein).<sup>12</sup> Unfortunately, the majority's characterization of the good cause

<sup>11</sup> The majority also seems enamored of the idea of waiver in this context, though it is chary of adopting such an approach. See footnote 4. Access to discovery cannot be conditioned on a waiver of constitutional rights. *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1978), nor generally is waiver of constitutional rights implied. *In re Halkin*, *supra*; *Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 142-45, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). But see *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976).

<sup>12</sup> The Supreme Court has not addressed this question directly, but its recent decision in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981) provides a helpful analogy. There the Court struck down a restraining order under Fed. R. Civ. P. 23 as an abuse of discretion, but commented:

Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses.

standard for such orders does not reflect a concern for the First Amendment interests that must be weighed. By requiring only a showing of one of CR 26(c)'s enumerated harms and that the discovery process not be impeded, the majority does not even require a trial court to look to the countervailing interests of the party against whom the protective order is sought.

### III

Recently, courts have struggled with devising standards by which trial courts should render protective orders when First Amendment interests are at issue. The cases of *Halkin* and *San Juan Star* are notable. While these courts have not evaluated protective orders "by the stringent standards governing classic prior restraints", *Koster*, 8 Media L. Rep. at 1159, they have required more rigorous standards for reviewing "good cause" determinations than "abuse of discretion".<sup>13</sup>

#### A

In *Halkin*, the court required "close scrutiny of [the impact of protective orders] on protected First Amendment expression", 598 F.2d at 186, viewing a protective order as a "direct governmental action limiting speech". *Halkin*, at 183. The court set forth a 2-part test of first determining the significance of the First Amendment interests restrained, and second, evaluating the restraint according to three criteria:

the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

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<sup>13</sup> The inconsistency of the majority's approach is made evident by its treatment of *Halkin* and *San Juan Star*. The majority states the standards articulated by those courts are not mandated by the constitution. Majority at 248. Yet the standards developed in both cases are less stringent than the heavy presumption against validity, which the majority purports to apply in dispensing with this case.



(Footnotes omitted.) *Halkin*, at 191. This approach requires the balancing of First Amendment interests against the harm avoided by the protective order, and imposes requirements of specificity, narrowness and an exhaustion of less intrusive alternatives.

I agree with the *Halkin* court that a trial court's ability to deny access does not dispose of the First Amendment concerns as to protective orders, but I do not feel the First Amendment analysis is the same regardless of the mode by which information is acquired. See *Halkin*, at 187-88, citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778, 783, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). The court has legitimate concerns in administering the discovery process, which may affect the extent to which First Amendment expression remains unimpaired. The same evil does not result "from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1448 (1968).

While the *Halkin* court does not focus on these legitimate concerns, the standards it articulates provide trial courts with the flexibility needed to address such concerns. See *Brink v. DaLesio*, 82 F.R.D. 664, 678 (D. Md. 1979) ("At most, the [*Halkin*] opinion will perhaps prompt a more reasoned and precise statement by judges in issuing Rule 26(c) orders.")

## B

The court in *San Juan Star* established a standard somewhat less restrictive than the *Halkin* majority; a standard of good cause that "incorporates a 'heightened sensitivity' to the First Amendment concerns at stake", 662 F.2d at 116. Judge Coffin articulated this heightened sensitivity thus: "We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary." *San Juan Star*, at 116. With respect to the "threatened harm", Judge Coffin felt it should be evaluated on a "sliding scale . . . as the



potential harm grows more grave, the imminence necessary is reduced." *San Juan Star*, at 116. More explicitly than did the court in *Halkin*, the court in *San Juan Star* recognized the legitimate concerns a court has in administering the discovery process which might justify subordination of First Amendment interests that could not otherwise be limited. Concerns for the administration of the discovery process and for minimizing injury to parties are legitimate bases for restricting First Amendment interests in the discovery context.

### C

While the United States Supreme Court has not addressed First Amendment concerns in discovery, I believe First Amendment interests must be weighed much as the Court required in *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). In *Pickering*, the Court dealt with the question of a teacher's First Amendment rights within the context of his employment. While the Court rejected unequivocally the Illinois Supreme Court's assertion that an individual may be forced to give up constitutional rights as a condition of public employment, the Court conceded:

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

391 U.S. at 568. Because of the multitude of situations that might arise, the *Pickering* Court did not presume to set forth any general standard for balancing the respective interests. Nor would I presume to do so in this case. Nonetheless, the

*Pickering* Court did require that the school's legitimate interests *actually* be served by a limitation on speech, and in a subsequent case dealing with the same concerns, the Court required a material and substantial interference with a school's interests in order and discipline to justify curtailment of First Amendment liberties. *Tinker v. Des Moines Indep. Comm'ty Sch. Dist.*, 393 U.S. 503, 508-09, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). I believe both *Halkin* and *San Juan Star* provide helpful guidelines to a trial court in striking the right balance. See Duke Note, *supra*, at 793-99. Below, I outline some of the questions a trial court should ask in determining if a protective order should issue:

1. What is the extent of the First Amendment interest enjoined by the protective order?

As the *Halkin* court indicated, "First Amendment interests will vary according to the type of expression subject to the order". 598 F.2d at 191. The majority distinguishes *Halkin* and *San Juan Star* as cases involving intense public concern while the matters before us are of less public consequence. Even assuming the validity of the majority's assertion, it has not provided an analytical framework by which we as a reviewing court will be able to differentiate this case from one in which the First Amendment interest is more substantial.

2. What is the harm threatened by failure to issue a protective order?

As the *Halkin* court indicated, "widely varying interests" may be advanced in support of a protective order. The rule itself allows for such breadth of interest: "the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . ." CR 26(c). As Judge Coffin indicated, the degree of imminence of any harm will vary in inverse proportion to the magnitude of the harm. An additional concern here is the question of how central the information is to the case. If the information is of central relevance, a party's

interest and expectation in privacy might be diminished. At the same time, the centrality of the information may affect a party's right to a fair trial.

3. What is the status of the parties seeking a protective order and against whom the protective order is sought?

The expectation of privacy will vary if the party seeking the order is a public body or a private person, or if the individual is a nonparty or central litigant. If a protective order is sought against a suing party, it might impede the party's First Amendment right to freely litigate, especially if such action is brought for a public purpose (e.g., civil rights, antitrust actions). See *Halkin*, 598 F.2d at 187; *In re Primus*, 436 U.S. 412, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978). If, on the other hand, the defendant is the party against whom the protective order is sought, the First Amendment right to litigate seems less in jeopardy. In addition, the court must be sensitive to concerns militating in favor of a protective order, namely a party's First Amendment interest "to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977). As one commentator has indicated, "In the absence of sufficient justification, a court's *denial* of a motion for a protective order may itself be an unconstitutional infringement of the producing party's first amendment rights." (Italics mine.) Duke Note, 1980 Duke L.J. at 793.

4. What specific concerns does the court have in issuing protective orders?

The court must determine whether the protective order will facilitate the administration of justice or undermine one of the purposes of the litigation, i.e., whether it prevents an abuse of process by a party or restrains a significant First Amendment interest. Besides the court's concern for minimizing injury to parties, the court has separate concerns for ensuring discovery is expeditious. If the absence of a protective order might mean a party's evasion of its duty to disclose and an end to voluntary compliance with discovery processes, a protective order may be the best means of insuring the orderly administration of discovery.

Once the interests for and against a protective order have been identified, the court must balance them, with the burden of justification resting on the party seeking the protective order. No simple rule will apply in all cases. If the government seeks to protect from dissemination highly relevant information regarding graft among public officials because of the annoyance and embarrassment of public disclosure, the balance will be struck differently than when a private party seeks to protect from public scrutiny personal details which are of questionable materiality to the case. Needless to say, courts should attempt to find the least restrictive accommodation of all interests, those of the parties and the court. See *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979); *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981). Often the only alternative to a protective order will be denial of access—a result which the *Halkin* court indicated benefits no one.<sup>14</sup> A natural concomitant of finding the best accommodation of all interests is that the protective order be narrow and precise to protect against the specific harm threatened. *Halkin*, at 191; *San Juan Star*, at 116. This does not mean that a court must supervise the discovery of every document. *San Juan Star*, *supra*; *Tavoulareas v. Piro*, 93 F.R.D. 11, 24 (D.D.C. 1981). To require as much would substantially undermine the purposes of discovery. Nevertheless, the court should restrain from publication only that which need be to prevent the harm that has been identified. Nor should the court restrain information for a period of time longer than is necessary. See *Halkin*, *supra*. Implicitly, this would mean the termination of the protective order once information protected is a matter of public record.

The above discussion is meant as a guide to trial courts, not as a fixed rule. The major premise of the discussion is that where First Amendment interests can be identified, the harm against which a protective order guards must be balanced against those First Amendment interests, with the burden of justification lying with the party seeking the restraint.

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<sup>14</sup> The *Halkin* court did identify alternatives to protective orders when the interest protected is an individual's right to a fair trial. See *Halkin*, 598 F.2d at 195.

## IV

Turning to this case, the trial judge issued both a protective order and a memorandum opinion regarding the protective order. The primary problem with the protective order is that it does not attempt to weigh petitioner's First Amendment interests in determining whether a protective order should issue. As the trial judge states at page 2 of his memorandum opinion:

Protective Orders are entered routinely in cases where the party seeking the Protective Order has a reasonable basis for its request that the information gained through discovery be used by the discovering party for no purpose other than the legitimate purposes of the case in which discovery was granted.

Such a test, which is identical to the majority's standard, does not require any "heightened sensitivity" to First Amendment concerns.

In addition, the court's "reasonable basis" in this case is simply too speculative and general to justify the restraint of First Amendment freedoms. The trial judge states on page 4 of his memorandum opinion:

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

And the protective order states:

the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts . . .



As a general proposition, the court's statement is certainly true in some cases. But is it true in this case? Would the risk of dissemination cause Rhinehart to drop his libel action? Or are there other specific concerns for minimizing injury and embarrassment to respondents that outweigh the petitioner's First Amendment interest in dissemination? Such concerns might well exist in this case, but they are not identified by the court. As a threshold consideration, the trial court must identify the specific harm in this case that warrants a protective order. Courts have generally required a "particular and specific demonstration of fact" to justify protective orders. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974). See *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (clearly defined and very serious injury); *Neonex Int'l Ltd. v. Norris Grain Co.*, 338 F. Supp. 845 (S.D.N.Y. 1972); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477 (W.D. Mo. 1950); *United States ex rel. Edelstein v. Brussell Sewing Mach. Co.*, 3 F.R.D. 87 (S.D.N.Y. 1943). Cf. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101, 68 L. Ed. 2d 693, 101 S. Ct. 2193, 2200 (1981) (Court struck down restraining order under Fed. R. Civ. P. 23 which affected First Amendment interests as an abuse of discretion because it was not based on a "clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.")). Here a specific finding by the court is required to insure that the restraint is justified.

On remand, I would call attention to two other concerns I have with the protective order. The order is narrow in that it restricts only the use of information gained through the discovery processes. Trial court memorandum opinion, at 3. The protective order is not narrow in two important respects, however. While Paragraph 2 of the order seems to limit restrictions on dissemination to financial data and certain names and addresses, Paragraph 3 states broadly (and somewhat inconsistently) "information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for



publication or dissemination." While Paragraph 3 is apparently limited by the specific information discussed in Paragraph 2, the court's opinion perpetuates the notion that *all* discovery information is restrained by the protective order:

The intent and purpose of the protective order will be that the discovering party make no use or dissemination of the information gained through discovery other than such use as is necessary in order for the discovering party to prepare and try the case. It follows that information gained through the discovery process will not be published by the Seattle Times or made available to any news media for publication or dissemination.

Trial court memorandum opinion, at 3. Similarly, the restraint is not limited in time. Literally, the order restrains from publication information that is introduced as evidence at trial. On remand, I would require the court, if it should issue an order, to specify the conditions of the restraining order more carefully.

Through this opinion, I do not mean to imply that a protective order may not issue in this case. I would simply require the trial court to undertake the *ad hoc* balancing test outlined above. This the trial court has not done. A specific harm has not been identified by the trial court, First Amendment interests are given no recognition, and the order does not reflect the narrowness which derives from a concern for such interests. I would vacate the protective order and remand to the trial court to reconsider the request for a protective order in light of the concerns identified in this opinion.

PEARSON, J. concurs with UTTER, J.

Reconsideration denied January 27, 1983.

No. 82-1721

Office-Supreme Court, U.S.

FILED

JUN 25 1983

ALEXANDER L. STEVAS,  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

THE SEATTLE TIMES COMPANY, a Delaware corporation,  
d/b/a, THE SEATTLE TIMES; WALLA WALLA  
UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE  
LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY  
and KAREN MCCOY,

*Petitioners,*

v.

KEITH MILTON RHINEHART, a single person; the AQUARIAN  
FOUNDATION, a Washington not-for-profit corporation;  
KATHI BAILEY, a married person, LILLIAN YOUNG, a  
married person, TONI STRAUCH, a married person,  
SYLVIA CORWIN, and ILSE TAYLOR, representing  
women who were members of the Aquarian Foundation  
on or after March 17, 1978,

*Respondents.*

On Petition For A Writ Of Certiorari To The  
Supreme Court Of The State Of Washington

**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI**

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### QUESTIONS PRESENTED FOR REVIEW

1. Have the respondents made a particularized showing of the need for a protective order where the uncontested evidence is that past publications by the petitioners have always been followed by threats, assaults, bombings, and injury to respondent Rhinehart and the members of respondent Aquarian Foundation?

2. Should a Rule 26(c) protective order be evaluated under the balancing test previously adopted by this Court to evaluate restrictions on first amendment rights where the state has a legitimate purpose unrelated to the suppression of expression?

3. Should a Rule 26(c) protective order be evaluated under a strict prior restraint analysis?

4. Did the petitioners waive their right to contest the constitutional validity of the protective order by agreeing to the entry of a protective order?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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No. 82-1721

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THE SEATTLE TIMES COMPANY, a Delaware corporation,  
d/b/a, THE SEATTLE TIMES; WALLA WALLA  
UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE  
LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY  
and KAREN MCCOY,  
*Petitioners,*

v.

KEITH MILTON RHINEHART, a single person; the AQUARIAN  
FOUNDATION, a Washington not-for-profit corporation;  
KATHI BAILEY, a married person, LILLIAN YOUNG, a  
married person, TONI STRAUCH, a married person,  
SYLVIA CORWIN, and ILSE TAYLOR, representing  
women who were members of the Aquarian Foundation  
on or after March 17, 1978,  
*Respondents.*

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On Petition For A Writ Of Certiorari To The  
Supreme Court Of The State Of Washington

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**BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI**

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The respondents respectfully ask that the Court deny  
the petition for a writ of certiorari filed by the petitioners.

**STATEMENT OF THE CASE**

Respondents Keith Milton Rhinehart, the Aquarian  
Foundation, a Washington not-for-profit corporation,

and Kathi Bailey have filed their own petition for writ of certiorari from the decision of the Washington Supreme Court from which petitioners seek review. *Rhinehart, et al. v. The Seattle Times, et al.*, No. 82-1758. Respondents refer in this brief to their own petition as the "Aquarian Foundation Petition," and to the petition in this proceeding as the "Seattle Times Petition."

The respondents filed this lawsuit for defamation and invasion of privacy in response to a series of articles published by the Seattle Times in an apparent campaign maliciously to defame and scorn the Aquarian Foundation, Reverend Rhinehart, and other members of the Foundation. The history of this lawsuit is set forth in the Aquarian Foundation Petition and will not be repeated here.

The Seattle Times immediately embarked upon an ambitious program of pretrial discovery, which Reverend Rhinehart and the Aquarian Foundation naturally assumed to have been undertaken for purposes of litigation. For example, the Seattle Times asked Reverend Rhinehart to produce all of the following documents prepared by him within the past ten years: United States income tax returns; financial statements; all documents which evidence gifts and donations from any source within the past ten years; all financial statements prepared for the Aquarian Foundation; all documents which evidence all assets and liabilities possessed by Reverend Rhinehart. (Clerk's Papers 730-35) The Seattle Times also set depositions of every plaintiff. (Clerk's Papers 742-44)

The Seattle Times deposed Reverend Rhinehart on June 10, 1980. The deposition opened with a discussion by counsel of documents to be produced. Reverend Rhinehart objected to the production of income tax re-

turns and asked whether information given in discovery could be published by the defendants: "Does that mean the reporters can publish all that?" (Rhinehart Dep., p. 6) Reverend Rhinehart was reluctant to turn over the documents without a court order. Counsel for petitioner Seattle Times stated:

MR. SCHWAB: I am willing to agree that we can have protective orders concerning personal financial data which would make it impossible for anyone to publish that.

(Rhinehart Dep., p. 6)

Later in the deposition, the Aquarian Foundation's attorney asked, "All financial information is subject to our agreement [that it is not to be published]?" (Rhinehart Dep., p. 21) The attorney for the Times responded:

MR. SCHWAB: It is very common in lawsuits, Erik [defendant Erik Lacitis, the reporter who wrote several articles defaming the plaintiffs], to have financial information subject to protective order. It means it can be used only in the case.

We will agree financial information that we obtain through discovery in this case from you or the Foundation is only to be used in this case and at trial. Our clients can see it because they are our clients. You have sued them and they work with us. I am sure we will agree that this is not to be published. We don't want the newspaper then publishing your financial affairs.

As a result of these assurances, the defendants were provided with income tax returns of Reverend Rhinehart and other financial information relating to all of the other plaintiffs. In addition, the plaintiffs produced for the defendants documents which literally filled an entire room.

The Seattle Times next served wide-ranging interrogatories on each of the plaintiffs. The interrogatories included a substantial number of questions relating to the financial circumstances of the parties, the names of donors to the Foundation and to the parties, specific information about each person's donations, and the names or addresses of members of the church over the last ten years.

The Aquarian Foundation and Reverend Rhinehart refused to provide a list of the names and addresses of members and donors on the ground that this information is protected by the first amendment of the United States Constitution and the Constitution of the State of Washington. (Reverend Rhinehart's and the Aquarian Foundation's answers are quoted in the Aquarian Foundation Petition, 4-7, 61a-71a.) When the Seattle Times moved to compel discovery of this information, the Aquarian Foundation and Reverend Rhinehart asked for a protective order. (Clerk's Papers 127-29)

Reverend Rhinehart and the Foundation sought the protective order to preserve the privacy of the members of the Foundation, and because they had learned that the Seattle Times or its counsel had been providing information to third parties for purposes of instituting lawsuits against the Foundation. (Clerk's Papers 127-28) The plaintiffs were further startled to learn that the Seattle Times vehemently resisted any protective order (Clerk's Papers 325-34), despite its own counsel's previous agreement to enter a protective order.

The trial judge initially denied the plaintiffs' request for a protective order. The trial court relied on *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), which required a specific factual showing which went beyond mere conclusory allegations. The trial judge stated:

The cases cited on this subject appear to come down to the proposition that when a court is confronted with the question of whether or not good cause exists for a protective order the case must be decided on its own facts with careful attention to the actual discovery materials involved, the extent to which good cause exists for a protective order and the scope of such an order, if one is to be entered, in order to prevent actual damage or a real threat of an unfair trial environment if the device of a protective order is not used.

In deciding *Halkin*, the Court brushed aside conclusory allegations as being insufficient to justify imposition of a protective order which would have had the effect of imposing prior restraint on the freedom of speech and of the press guaranteed by the First Amendment.

At this time, the plaintiff's motion for a protective order will be denied. This denial, however, is without prejudice to plaintiff's right to move for a protective order in respect to specifically described discovery materials and a factual showing of good cause for restraining defendants in their use of those materials.

(Letter from Judge Jack P. Scholfield to Counsel, dated February 17, 1981, reproduced in the Aquarian Foundation Petition, 72a, 85a)

The plaintiffs had previously filed the affidavits of Keith Milton Rhinehart and of counsel relating that anonymous persons had threatened Reverend Rhinehart with violence on a number of occasions after the Seattle Times published the defamatory articles, and that the Seattle Police Department had advised Reverend Rhinehart to keep his residence a closely guarded secret. (Supplemental Clerk's Papers 36-39) After Judge Scholfield's opinion, the plaintiffs filed additional affidavits to



prove the need to protect the names and addresses of the members of the Aquarian Foundation. Robert Plante, an employee of the Foundation, was the victim of a series of life-threatening incidents at the Seattle church after defendant Seattle Times and defendant Walla Walla Union-Bulletin published articles about the Foundation. These incidents so terrorized Mr. Plante that he was forced to leave Seattle. (App. A, *infra*, 1a)

Mr. Plante witnessed a series of telephone threats, bomb threats, an assault on an elderly female member, a bombing of the church, and an assault with a shotgun. Mr. Plante explained that, "Every time [defendant] Erik Lacitis would write an article in the Seattle Times in reference to the Aquarian Foundation, more of these threats would begin to filter into the church. . . ." Four other members of the Foundation filed similar affidavits. (Clerk's Papers 118-19, 254-60, Second Supplemental Clerk's Papers 8-29)

The trial court then decided that the plaintiffs had established "reasonable grounds" for the issuance of a protective order. (Seattle Times Petition, App. A at 3a) The trial court entered a protective order which states in the preamble that it is based upon the five affidavits submitted by members of the Foundation. (Seattle Times Petition, App. B at 5a)

The Washington Supreme Court upheld the protective order. (Seattle Times Petition, App. C)

## **REASONS WHY THE WRIT SHOULD BE DENIED**

### **1. Introduction.**

This Court should deny the Seattle Times Petition for Writ of Certiorari because the decision of the Washington Supreme Court is consistent with prior decisions of this Court. Any conflict between the decision of the Washing-



ton court and decisions of federal circuit courts of appeals is insubstantial, because the protective order at issue here would be upheld under the reasoning of any case which has dealt with the relationship between protective orders and the first amendment.

The petitioners build their case for review upon a faulty foundation. The petitioners wrongly assume that the first amendment freedom of the press is preeminent among our liberties and that every other constitutional right must yield to the power of the press.

The petitioners have forgotten that the first freedom guaranteed by the first amendment is the free exercise of religion. The petitioners ask the court to force the Aquarian Foundation to divulge the names of its members and donors, a revelation which compromises and infringes upon the first amendment right of every member freely to associate and worship with the Aquarian Foundation. The petitioners insist simultaneously that the court cannot prevent them from trumpeting to the world any information learned through discovery, sanctimoniously insisting that the first amendment exempts the press from any protective order.

The petitioners have forgotten as well that the first amendment applies to the state of Washington only through the due process clause of the fourteenth amendment. Surely the due process clause guarantees to the Aquarian Foundation and its members an effective judicial forum in which to seek redress for injuries inflicted by reckless and defamatory reporting. The petitioners would destroy any semblance of due process by depriving the courts of the power to control their own procedures and by stripping plaintiffs of their constitutional rights as they cross the courthouse threshold.

This distorted perception of our liberties is insupportable. Important though it may be in our democratic society, freedom of the press is not the queen of the Bill of Rights. Indeed, freedom of the press should be regarded as the handmaiden of our other liberties, a mechanism to prevent the state from trammeling the free exercise of religion, of assembly, or redress of grievances.

When constitutional rights collide, they must be weighed against one another to strike a balance which best accommodates the competing claims of the parties. The Washington Supreme Court recognized this fact, and weighed the interest of the state in providing an effective judicial forum, together with the privacy and religious rights of the respondents, against the alleged right of the petitioners to publish freely any information learned through discovery. The Washington court correctly concluded that ample facts supported the trial court's decision to enter a protective order in this case.

This Court need not review the conclusion of the Washington Supreme Court that the petitioners' first amendment claims must yield to accommodate the conflicting interests presented here. However, if the Court grants review of the Seattle Times petition, the Court should also grant review of the Aquarian Foundation petition. The discovery order from which the Foundation seeks review was premised in part upon the continuing validity of the protective order from which petitioners seek review. The discovery order merits review independent of the protective order, but review of the discovery order is even more crucial if review is granted here.

2. The Protective Order Was Amply Justified Even Under The Strictest Prior Restraint Analysis In Light Of The Specific Factual Showing That Members Of The Aquarian Foundation Have Been Threatened, Assaulted, And Injured Following Previous Defamatory Publications By The Seattle Times. (Reply to Petitioners' Argument I)

This Court need not accept review of the decision of the Washington Supreme Court to uphold the protective order because the protective order would be justified under any standard of review in light of the specific factual showing that publication of the information sought in discovery will endanger members of the Aquarian Foundation and subject them to threats upon their lives. The protective order is also necessary to minimize the infringement upon Aquarian Foundation members' rights to freely exercise their religious beliefs and to maintain their privacy. The decision of the Washington Supreme Court is correct whatever standard this Court might adopt, and review by this Court would serve no purpose.

The petitioners note that this Court in *Nebraska Press Association v. Stewart*, 427 U.S. 539, 565 (1976), required a specific factual showing before enjoining publication of pretrial news accounts.<sup>1</sup> (Seattle Times Petition 8-9) Similarly, the District of Columbia Circuit Court of Appeals and the First Circuit each emphasized the requirement of a particularized factual showing to justify the imposition of a protective order. *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176, 192, 195-96 (D.C. Cir. 1979).

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<sup>1</sup> Petitioners also rely upon this Court's review of a trial court's exercise of its discretion under Federal Rule of Civil Procedure 23(d) in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). *Gulf Oil* is inapposite because this Court specifically reserved the first amendment issue. 452 U.S. at 101 n. 15.

The Washington Supreme Court held that the plaintiffs had produced sufficient evidence that they would be harmed by the dissemination of discovery materials. The Washington court examined the three factors identified by this Court in *Nebraska Press Association*:

As the Supreme Court directed in *Nebraska Press Ass'n*, we must also examine whether the order here furthers those purposes and interests, whether other measures would be likely to mitigate the effects of the unwanted publicity involved here; and how effectively the protective order would operate to prevent the threatened harm.

(Seattle Times Petition, App. C at 12a) The Washington Supreme Court examined the record and found that the plaintiffs had presented sufficient facts to the trial court to justify entry of the protective order:

Our understanding of [Washington Civil Rule 26(c), identical in all material respects with Fed. R. Civ. P. 26(c)], contrary to that of the federal circuit courts in *In re Halkin, supra*, and *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), is that "good cause" is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process. In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. . . .

Here, there is no question but that the defendants were threatening to publicize the information which they gained through the discovery process. They insist upon their right to do so. The information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had

a recognizable privacy interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression.

....

We find no abuse of discretion and affirm the issuance of the protective order.

(Seattle Times Petition, App. C at 37a-38a)

The Washington Supreme Court properly considered the trial court's initial refusal to enter a protective order based on "conclusory allegations" and the trial court's insistence upon a showing of specific facts to justify the protective order. (Aquarian Foundation Petition, App. G at 85a) The trial court entered the protective order only after five members of the Foundation filed affidavits detailing the numerous assaults and life-threatening incidents which have occurred at the Aquarian Foundation since the publication by the Seattle Times of the defamatory articles. The trial court considered the fact that no such incidents occurred prior to the publication of the articles (Clerk's Papers 257) and that these incidents increased on each occasion the Times published an article (App. A at 4a)

The plaintiffs' specific factual showing of need for a protective order amply justifies the entry of the order even under the most restrictive test suggested by the petitioners, i.e., the prior restraint analysis adopted by this Court in *Nebraska Press Association*.

The petitioners argue that the decision of the Washington Supreme Court conflicts with this Court's decision in *Nebraska Press Association* in "sanctioning a ban on publication without any showing of specific harm caused by such publication." (Seattle Times Petition at 7) The perceived "conflict" is nonexistent. The record in this



case is replete with evidence that the members of the Aquarian Foundation would be endangered by public dissemination of their names and addresses, and the Washington Supreme Court correctly relied on this evidence when it affirmed the protective order. The Molotov cocktail hurled through the window of the Aquarian Foundation was not "conjectural," as the petitioners' suggest. (Seattle Times Petition at 7) The blood shed by an elderly female member of the Foundation when two men beat her over the head with a shovel at the entrance of the church does not constitute "speculation." (*Id.*) The death threats, hate mail, and gun-waving incidents are not "factors unknown and unknowable." (*Id.* at 8)

The petitioners misapprehend the reasoning of the Washington Supreme Court and distort the court's decision by lifting quotations out of context. The Washington Supreme Court pointed out that the burden of justifying any protective order is upon the judiciary, and devoted most of its opinion to the role of discovery within the litigation process. (Seattle Times Petition, App. C at 12a-34a) The court concluded that state's interest in the integrity of the adversary system of justice justified the imposition of a protective order upon a proper showing. (*Id.* at 34a-35a) The court then weighed the petitioners' interest in publicizing the information sought through discovery (*Id.* at 36a) against the plaintiffs' rights in maintaining confidentiality of the information and concluded that the protective order was justified under the facts of this case. (*Id.* at 37a-38a)

The petitioners seize upon isolated statements in that portion of the court's opinion dealing with the general interest of the judiciary in maintaining the integrity of the discovery process. The petitioners would have this court believe that these out-of-context statements mean that



the protective order "curtails petitioners' exercise of first amendment rights without any showing of specific harm caused by the publication in question." (*Id.* at 7) The petitioners ignore the Washington court's holding that the trial judge must weigh the respective interests of the parties in light of the facts of the case. (*Id.* at 37a) The petitioners also ignore the trial judge's initial refusal to enter a protective order, a reluctance overcome only by affidavits which specifically listed the danger of disclosure.

The Washington Supreme Court's approval of the protective order was premised upon a specific factual showing that the plaintiffs would be injured by disclosure. There is no conflict between the decision of the Washington Supreme Court, this Court's decision in *Nebraska Press Association*, or the rulings of United States courts of appeals that publication may be restrained only upon a specific factual showing.

**3. The Washington Supreme Court Properly Balanced The Plaintiffs' Rights To Freedom Of Religion And Privacy And The State's Interest In The Integrity Of The Judicial Process Against The Petitioners' Rights To Freedom Of Speech And Of The Press. (First Reply To Petitioners' Argument II)**

This Court has repeatedly used a balancing test to evaluate restrictions on speech or publication where the state has imposed the restriction for a legitimate purpose unrelated to the suppression of speech. In such cases, this Court has balanced the state's interest in the restriction against the interest of the parties in dissemination or publication of the information in question. *See, e.g., Procter v. Martinez*, 416 U.S. 396 (1974); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

The Washington Supreme Court adopted a similar balancing test in this case. Having found a legitimate state interest in preserving the integrity of the courts through judicial control of pretrial discovery, the court weighed the plaintiffs' interest in privacy and freedom of religion against the petitioners' interest in publication of any information learned through discovery. The decision below is fully consistent with this Court's prior decisions, and, contrary to petitioners' claims, is similar to the approach adopted by federal circuit courts of appeals which have considered similar protective orders.

In *Pickering v. Board of Educ.*, a school teacher was fired for writing a letter critical of the school board to a local newspaper. This Court balanced the teacher's first amendment right to comment on matters of public interest against the state's interest as an employer in promoting the efficiency of the public services of its employees. 391 U.S. at 568. The Court employed a similar balancing test in *Procunier* and in *Tinker*. Most recently, the Court followed the *Pickering* balancing approach in *Connick v. Myers*, \_\_\_ U.S. \_\_\_, 75 L. Ed. 2d 708, 722 (1983).

Commentators have suggested that the *Pickering* balancing approach is the appropriate test for evaluating the propriety of a protective order against dissemination or publication of pretrial discovery materials. Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645, 1654 (1980); Note, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 Duke L. Rev. 766, 794-95.

The First Circuit employed a balancing test in *San Juan Star*, a case on which the petitioners rely heavily. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529

F. Supp. 866, 911-12 (E.D. Pa. 1981). The First Circuit decided that the trial court must weigh a number of factors in deciding whether to impose a protective order. *San Juan Star*, 662 F.2d at 116.

The Washington Supreme Court engaged in the same balancing process used by this Court in *Pickering*, *Tinker*, and *Procunier*. The court first pointed out that, "The restraint is not inspired by any governmental objection to the content of the publication. . . ." (Seattle Times Petition, App. C at 11a) (*Compare Procunier*: "[T]he regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." 416 U.S. at 413.) The court discussed at length the goal of pretrial discovery "to enable the parties to prepare their cases for trial." (Seattle Times Petition, App. C at 13a) The Washington court concluded that the judicial system has a legitimate and important interest in protecting the privacy rights of litigants forced to disclose confidential information. (*Id.* at 35a) Having already concluded that no less onerous restrictions would be effective (*Id.* at 12a), the court proceeded to balance the interests of the parties and concluded that the protective order was appropriate. (*Id.* at 37a-38a)

The decision below applies the balancing process adopted by this Court in prior first amendment cases and does not conflict with prior law.

**4. The Washington Supreme Court Did Not Hold That The First Amendment Does Not Apply To Pretrial Discovery Materials. (Second Reply to Petitioners' Argument II)**

The petitioners argue that the decision below conflicts with decisions of federal circuit courts of appeals insofar as the Washington Supreme Court exempted pretrial discovery from first amendment analysis. The petitioners

have made this argument only by creatively editing to suggest a holding which the Washington court never reached. The "conflict" with federal cases does not exist.

The Washington Supreme Court did not hold that the first amendment has no application to pretrial discovery materials. To the contrary, the court assumed the application of the first amendment and applied a prior restraint analysis to the protective order. (Seattle Times Petition, App. C at 11a) The court discussed the many statutory provisions restricting dissemination of information, and acknowledged that these statutory provisions, like protective orders, encroach upon first amendment rights. (*Id.* at 19a) The court held that the degree of protection afforded by the first amendment increases in proportion to the intensity of the legitimate interest which the public has in learning about the information. (*Id.* at 31a) The court alluded to this Court's prior decisions "balancing First Amendment rights against other interests of the state." (*Id.* at 36a) Finally, the court concluded that the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the "heavy burden" of justifying a protective order. (*Id.* at 37a)

It is surprising that the petitioners argue that the Washington Supreme Court rejected any first amendment protection for pretrial discovery information in the face of the Washington court's prior restraint analysis and constant reference to first amendment rights. The petitioners' interpretation of the decision below is reached by careful selection from the decision of isolated phrases which the petitioners link together through editorial comment:

The court concludes that "the reporting of supposed facts elicited in discovery" is not pro-

tected by the First Amendment where such reportage is not characterized by "advocacy or abstract discussion" and involves no apparent "significance with respect to governmental activity." (App. 29a, 36a)

(Seattle Times Petition at 12) These isolated phrases, when restored to their context, simply do not support the petitioners' interpretation.<sup>2</sup>

The decision below is for the most part consistent with the holding in *San Juan Star*, *supra*. The *San Juan Star* test was devised to protect first amendment rights by weighing the following factors:

We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary.

662 F.2d at 116. The Washington Supreme Court considered these same factors. (Seattle Times Petition at 12a, 37a-38a) Despite the court's criticism of *San Juan*

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<sup>2</sup> The contexts of the statements are:

These cases are concerned with the rights of advocacy, and the dissemination of ideas, which lie at the core of First Amendment protection. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978). There is no advocacy or abstract discussion involved here—only the reporting of supposed fact elicited in discovery.

....

We are not told what interest of the public is served by the newspaper's further exposure of this allegedly religious sect, unorthodox though it undoubtedly is, but we assume that publishers could rightly find it newsworthy. It may have some significance with respect to governmental activity, but, if so, that fact has not been brought to light.

(Seattle Times Petition, App. C at 29a, 36a; emphasis supplied.)



*Star* (Seattle Times Petition, App. C at 27a, 37a), the protective order here would doubtless withstand scrutiny under the *San Juan Star* test, just as the protective order in *San Juan Star* was upheld by the First Circuit.

The petitioners argue that the decision below conflicts with a number of federal cases. These conflicts are either nonexistent or insubstantial. The plaintiffs argue that the decision of the Washington court conflicts with the decision of the District of Columbia Circuit in *In re Halkin*. (Seattle Times Petition at 13-16) The difference between *Halkin* and other federal cases is a matter of degree. *Halkin* is more hostile towards protective orders and more accommodating of first amendment concerns, but both *Halkin* and *San Juan Star* call for consideration of similar factors. Compare *Halkin*, 598 F.2d at 191 with *San Juan Star*, 662 F.2d at 116.

Any difference in result between the two cases may be due in part to the different factual situations in which the issue arose. In *Halkin*, the government had already produced information without the shield of a protective order, and later moved to impose the protective order. 598 F.2d at 180-82. By contrast, in *San Juan Star*, as in this case, private parties sought a protective order before disclosing the information. 662 F.2d at 111. See also Note, *The First Amendment Right to Disseminate Discovery Materials*, 92 Harv. L. Rev. 1550 (1979) (criticizing the majority decision in *Halkin* and pointing out that the facts of the case make it unlikely that a protective order would ever be appropriate under any standard).

The petitioners argue that the decision below not only conflicts with *Halkin* and *San Juan Star*, but with a number of other federal cases which have considered the same issue. (Seattle Times Petition at 17) Upon examination, only one of these cases is actually inconsistent with



the decision of the Washington Supreme Court here. *Davis v. Romney*, 55 F.R.D. 337 (E.D. Pa. 1972). The other cases cited by the petitioners are either distinguishable on the facts,<sup>3</sup> or fail to support petitioners' own arguments.<sup>4</sup>

The petitioners note correctly that the Second Circuit has stated that there is "no doubt as to the con-

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<sup>3</sup> In *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983), the court struck down a protective order which prohibited counsel from discussing with their clients information learned in discovery. The protective order here is far narrower and does not interfere with petitioners' rights to participate in their own defense. In *Koster v. Chase Manhattan Bank*, 93 F.R.D. 371 (S.D.N.Y. 1982), the court found it unnecessary to decide among the different standards of Rule 26(c), *San Juan Star* and *Halkin*, because the defendant failed even to meet the lenient good cause standard of Rule 26(c). 93 F.R.D. at 480. In *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.), *cert denied*, — U.S. —, 102 S. Ct. 54, 74 L.Ed.2d 59 (1982), the appellate court approved the measures adopted by the trial court "to protect state and federal grand jury secrecy provisions, to protect legitimate law enforcement interests, and to protect the privacy rights of individuals." 671 F.2d at 216. In two of the cases cited by petitioners, the trial court refused to permit publication of information even under the *Halkin* standard. *Tavoulareas v. Piro*, 93 F.R.D. 24 (D.D.C. 1981); *Brink v. DaLesio*, 82 F.R.D. 664 (D. Md. 1979). *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977), and *United States v. Exxon Corp.*, 94 F.R.D. 250 (D.D.C. 1981), simply held that a party had failed to prove that it would be harmed by disclosure.

<sup>4</sup> In *Zenith Radio Corp.*, *supra*, the Eastern District Court of Pennsylvania rejected the *Halkin* analysis in favor of the *San Juan Star* standard, which it characterized as a balancing test. 529 F. Supp. at 909, 911-12. Contrary to the petitioners' representations, *United States v. Hooker Chemical & Plastics Corp.*, 90 F.R.D. 426-27 (W.D.N.Y. 1981), does not "apply *Halkin*," but deferred the *Halkin* issue until the moving party could present a better record. 90 F.R.D. at 426.

stitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes." *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963). However, the petitioners fail to cite *In re Upjohn Co. Antibiotic Cleocin Prod.*, 664 F.2d 114, 118, n. 1 (1981), in which the Sixth Circuit questioned the wisdom of the *Halkin* decision and expressly declined to rely on *Halkin*.

The petitioners argue that the decision below "is premised upon an improperly restrictive review of the purposes and uses of civil litigation," quoting federal cases which hold that discovery proceedings are presumptively open to the public. (Seattle Times Petition at 18) Whatever may be the federal rule, the Washington Supreme Court pointed out that Washington pretrial discovery is not open to the public. (Seattle Times Petition, App. C at 25A) This Court need not consider further an issue which is obviously a matter of state law.

The petitioners argue that the decision below "also conflicts with the first amendment test of another state court of last resort," citing two Montana cases. (Seattle Times Petition at 19) Neither Montana case is inconsistent with the decision below. In *Kuiper v. District Court*, 632 P.2d 694 (Mont. 1981), the Montana Supreme Court refused to impose a protective order on information independently obtained by the plaintiff through procedures other than discovery proceedings. In *Montana Human Rights Comm'n v. City of Billings*, 649 P.2d 1283 (Mont. 1982), the Montana court, like the Washington Supreme Court, found that the privacy rights of the individual litigants outweighed any interest in dissemination of information requested in discovery.

The petitioners fail to note that the decision of the Washington Supreme Court is *consistent* with the deci-

sion of the Court of Appeals of California in *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982). The California Court of Appeals rejected *Halkin*, holding that the first amendment does not preclude protective orders forbidding the publication of information obtained through discovery. 187 Cal. Rptr. at 9.

The conflicts which the petitioners perceive between this case and prior federal and state cases are either nonexistent or insubstantial. The Washington Supreme Court has neither approved of a "blanket exception to the First Amendment" nor imposed a gag order, as petitioners claim. (Seattle Times Petition at 16) Review by this Court is not merited.

**5. The Prior Restraint Analysis Urged By Petitioners Has No Application To Information Obtained Through Discovery. (Reply to Petitioners' Argument III)**

The petitioners argue that the decision below conflicts with prior decisions of this Court by permitting a prior restraint upon a mere showing of good cause. (Seattle Times Petition at 21-25) No such conflict exists because prior restraint analysis does not apply to materials obtained through pretrial discovery.

The two lead cases on which petitioners rely, *Halkin* and *San Juan Star*, both held that prior restraint analysis should not be employed in evaluating the propriety of protective orders imposed during pretrial discovery. *Halkin*, 598 F.2d at 186; *San Juan Star*, 662 F.2d at 115. See also *Koster v. Chase Manhattan Bank*, *supra*, 93 F.R.D. at 476.

The historical background of the first amendment makes clear that the First Congress did not intend that the first amendment would restrict the ability of the court to protect the privacy of information discovered through

the court's own process. On September 24, 1789, the Congress passed Section 30 of the Judiciary Act, providing, "*inter alia*, that the deposition after taking 'shall . . . be by him the said magistrate sealed up and directed to such court, and remain under this seal until opened in court.' " *Times News Limited (G. Britain) v. McDonnell-Douglas Corp.*, 387 F. Supp. 189, 195 (C.D. Cal. 1974). The first ten Amendments to the Constitution were submitted by Congress to the states by resolution passed either September 25 or September 29, 1789. Thus, the first amendment and the provision for insuring the privacy of material discovered in a deposition were virtually contemporaneous. As stated by Judge Hall in the case cited:

[I]t is hardly logical that Congress would create the right of privacy in depositions September 24, 1789 (the date of approval of the Judiciary Act by the President) and ask the States to destroy that right the next day or so.

*Times News Limited, supra*, at 195.

The petitioners make the incredible argument that the protective order has curtailed newspaper coverage and has denied to the public factual data to evaluate whether or not the prior defamatory statements were accurate. (Seattle Times Petition at 23) The protective order cannot be read so expansively. The order simply prohibits the defendants from disseminating narrowly defined information "which is gained through discovery." (Seattle Times Petition, App. B at 6a) It may well be that this lawsuit has deterred the Seattle Times from publishing articles about the Aquarian Foundation, but the reason can only be the Seattle Times' belated realization that the

Aquarian Foundation will hold the Times accountable for defamatory journalism.<sup>5</sup>

Finally, the petitioners complain that the duration of the protective order is excessive, illustrating their argument by the fact that the protective order has remained in place since June 26, 1981. (Seattle Times Petition at 24-25) It is difficult to understand why the petitioners complain about the duration of the order. The trial judge stayed the effect of the discovery order pending review of the protective order. (Aquarian Foundation Petition, App. D at 60a) Accordingly, no information has been produced since June 26, 1981, and the only effect of the protective order has been to formalize the Seattle Times' own agreement to the entry of a protective order with respect to financial information already produced.

**6. The Defendants Have Waived Any Right To Object To The Protective Order By Agreeing That A Protective Order Should Be Entered.**

The petitioners have waived any right to object to the entry of a protective order with respect to financial information disclosed through discovery. Counsel for petitioner Seattle Times agreed during discovery to the entry of a protective order. (*See* page 3, *supra*.) The plaintiffs

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<sup>5</sup> The petitioners argue further that the protective order "halts all such commentary and coverage by The Seattle Times" because, "even if petitioners manage to obtain information about Rhinehart from third parties, they are prohibited from confirming the accuracy of their sources or determining the appropriate leads to follow because such basic journalistic practices would run afoul of the Protective Order. . . ." (Seattle Times Petition at 23, n. 7) The protective order has no such effect. The Seattle Times is free to confirm its sources or follow any leads through information not obtained through discovery. The protective order prevents the petitioners from using information gleaned from the discovery process.



disclosed financial information pursuant to that agreement. The only effect of the protective order is to require the petitioners to live up to the terms of their agreement. The protective order is limited to the financial affairs of the plaintiffs, the names and addresses of the Aquarian Foundation members, contributors or clients, and the names and addresses of those who have been contributors, clients or donors to any of the various plaintiffs. (Seattle Times Petition, App. B at 6a) Since the case can be decided on the grounds of waiver, this Court need not accept review.<sup>6</sup>

Federal courts have consistently held in similar circumstances that a party who agrees to the entry of a protective order may not later contest the order and seek to disseminate information disclosed under the terms of the order. *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 298 (2d Cir. 1979); *Nat'l Polymer Prod. Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423-24 (6th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, *supra*, 529 F. Supp. at 894; *GAF Corp. v. Eastman-Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976).

The petitioners have waived any right to contest the protective order entered by the trial court and approved by the Washington Supreme Court. Further review by this Court is inappropriate and unnecessary.

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<sup>6</sup>The Washington Supreme Court declined to hold that all litigants waive their right to contest the constitutionality of protective orders (Seattle Time Petition, App. C at 20a), but never reached the waiver argument suggested here, despite the fact that the plaintiffs argued waiver in the trial court (Clerk's Papers 291-292) and in the Washington Supreme Court. (Brief of Respondents 27-29)



### CONCLUSION

The Washington Supreme Court correctly balanced the conflicting constitutional rights involved in this case and properly accommodated those interests consistent with prior decisions of this Court. The "conflict" between the decision of the Washington Supreme Court and prior decisions of this Court is nonexistent or insubstantial. In any event, the petitioners have waived any right to contest the terms of this protective order and review by this Court would be inappropriate.

The Petition for a Writ of Certiorari filed by the Seattle Times and the other defendants should be denied. However, if the Court grants the Seattle Times petition, the Court should also grant the Aquarian Foundation petition.

DATED June 24, 1983

Respectfully submitted,

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## **APPENDIX**

## APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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No. 80-2-02460-4

---

KEITH MILTON RHINEHART, a single person, et al.,  
*Plaintiffs,*

v.

THE SEATTLE TIMES, et al.,  
*Defendants.*

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### SWORN AFFIDAVIT OF ROBERT PLANTE

I, Robert Plante, have been employed by the Aquarian Foundation located at 315-15th Avenue East in Seattle, Washington, for approximately three years. I am head of the Audio-Visual Department of the Aquarian Foundation.

Of the approximately 3 years that I have been employed by the Aquarian Foundation, I have lived in Seattle, Washington, from December 1977 to February 1980. I have been residing in another state after leaving Seattle because of intense fear and anxiety. The following paragraphs describe the reasons for my fears of living and working in the Seattle area for the Aquarian Foundation.

Since the publication of the February 17, 1978, *Walla Walla Union Bulletin* article by John McCoy about the Aquarian Foundation presentation at the Walla Walla State Penitentiary, and the series of articles by Erik Lacitis about the Aquarian Foundation starting in March of 1978 in the *Seattle Times*, many terrifying and threatening incidents have taken place at the Aquarian Foundation.

One incident which happened on September 6, 1978, was a telephone call from an individual known as Laddie Wright at 1:00 a.m. Prior to this date I had received other threatening

phone calls from this individual. The telephone conversation at 1:00 a.m. on September 6, 1978, involved Laddie Wright threatening to kill Reverend Keith Milton Rhinehart and to blow up the church located at 315-15th Avenue East, in Seattle. Since I worked in this building and spent much of my time there, I became fearful for my life at that time.

My fears became even stronger when Laddie Wright entered the church in Seattle on September 6, 1978, at approximately 10:00 p.m. He entered the church where I and others were working. I met with Laddie in the room off to the right of the front hallway as you enter the church. After entering the room, I sat down with him to question him about the threats that he had been calling in to the Aquarian Foundation which referred to killing Reverend Rhinehart and blowing up the church. Suddenly, Laddie opened his shirt to reveal that he was wired with instruments and listening devices. He told me in a note that the wires were transmitting to a van parked outside the church and that people were listening to the conversation we were holding. At a later date, it was learned that Laddie had been armed with a .357 magnum at the time of this incident, and had been sent in so armed by several law enforcement governmental agencies, including the U.S. Customs Agency. This increased my fears even more.

All of these incidents involving Laddie Wright's bomb threats, murder threats, and threatening phone calls were reported to the police department in Seattle. However, despite our reports, no results were obtained. It did not seem that the proper police authorities had any interest in pursuing Laddie Wright.

Another very disturbing incident happened on November 22, 1978. It was at approximately 7:00 p.m. and I had left the church located at 315-15th Avenue East in Seattle for only a short period of time. While I was gone, one of our elderly female members was attacked by two men while she was entering the front door of the church. The two men attacked her by beating her over the head with a shovel until her head

was bleeding and blood was running down her face. It is beyond my understanding why anyone would want to attack an elderly woman, especially on the front steps of a religious organization.

My fears were further strengthened on December 25, 1978 when I received a threatening phone call informing me that our church was going to be blown up. In this particular telephone threat, the caller spoke many obscenities and threatened the lives of many individuals connected with the Aquarian Foundation and especially the life of Rev. Keith Milton Rhinehart. During that same day after it was dark, a bomb did indeed come hurling through a second story window of the Aquarian Foundation located at 315-15th Avenue East in Seattle. When the bomb came through the window, it shattered but did not blow up. The bomb consisted of a wick in a coca-cola bottle with some kind of fluid with white substance-like powder in it. The wick showed signs of having been partially burnt. This took place on Christmas Day. I called the police department to have them come out and investigate this. Before they arrived, another one of our employees picked up the bomb off the floor and set it on a desk without thinking. The reason I mention this is because the other employee's finger prints would have definitely been on the bomb. I will refer to this point as I continue.

When the police responded to my call, the officer who arrived at the church informed me to take the bomb and throw it in the trash. I was extremely fearful and asked him to call the bomb squad in order to dispose of the bomb in the appropriate manner. The officer was hesitant to do this, but he eventually did call the bomb squad.

When the bomb squad arrived, they came to the upstairs floor of the Aquarian Foundation to view the bomb which had a partially burned wick mixed with fluid containing a white powder or substance. After viewing the bomb, they began to laugh. They acted as if it wasn't dangerous even though they hadn't analyzed it. However, when they went to pick up the



bomb, they did it very cautiously with long thong-type holders. I was told by one of the members of the bomb squad that I could get an analysis of the bomb's contents the next day in the downtown office. The next day I went to that office and was informed that the other gentlemen must have been mistaken because the results wouldn't be known for possibly a month. I went back to the bomb squad office several times after that, the last being in July of 1979. I was informed that the bomb contained some kind of flammable fluid. When I questioned them about the white substance in the bottle, they couldn't answer. When I asked if there were any fingerprints on the bottle, they said none showed up even though one of our employees would have definitely had to put his prints on the bomb in order to pick it off the floor of the second story and set it on the desk. I asked for a report on the results of the testing, and six months after the bombing incident, I still hadn't any results from the Seattle Bomb Squad. This added to my suspicions and fears greatly.

My fears grew more by seeing that we were getting little if any results from the police department in Seattle, Seattle being the place that the threats and nerve shattering events were taking place. There were many other threatening phone calls which took place during my employment at the Aquarian Foundation. Everytime Erik Lacitis would write an article in the *Seattle Times* in reference to the Aquarian Foundation, more of these threats would begin to filter in to the church located at 315-15th Avenue East in Seattle Washington.

In December of 1979, my fears were strengthened even more. At this time, I became very, very very afraid of even being in Seattle. The incident that took place at that time was the trip to Bogota, Colombia by members of the Aquarian Foundation, including myself. Reverend Rhinehart had been invited to Bogota to a large parapsychological convention. I went on the trip to film both Reverend Rhinehart and the other participants in this so-called large parapsychological convention. It seems as though we were set up in Bogota, Colombia. During one of Reverend Rhinehart's meetings, which was



sponsored by a group in Bogota, our meeting was infiltrated by DAS agents, that is the Secret Police in Bogota, Colombia. After the meeting, we were arrested and jailed in the most indescribable conditions that one could imagine. Later I found out that while we were jailed on charges of necromancy and witchcraft, Erik Lacitis of the Seattle Times was again feeding false and evil material about the Aquarian Foundation to the media, thus endangering our lives in Bogota and those of our members throughout the world.

After returning to Seattle, Washington and discovering the slanderous filth fed by Erik Lacitis to KOMO-TV and aired to hundreds of thousands of people, my fears heightened to a point that I felt I would have to leave the city and go into hiding in order to get away from the harassment that was taking place in Seattle towards the Aquarian Foundation. But, before I was even able to leave Seattle again, on February 7, 1980, I received a phone call in the morning from an insane person who was echoing the innuendos that Erik Lacitis and John McCoy had set forth in their libelous articles. He was hollering obscenities over the telephone saying he was going to kill all of us homosexuals and all of us sex deviates and especially Rhinehart.

On that afternoon, a crazy man appeared in front of the Foundation located at 315-15th Avenue East in Seattle, out on a public street, on the sidewalk, with a shot gun. He was hollering all kind of obscenities at the church saying he was going to kill that "queer Reverend Rhinehart and all of the queers inside" and so on and so on. At this time he proceeded to take the shot gun out of the case. He broke it down and loaded it, waving it at the church. We had a member, an older woman, who helped us in cleaning and keeping up the church. She was working downstairs and I was afraid for her life since she was near the front door which had a glass window. I had to go downstairs and walk by this glass window to get her upstairs in case this madman tried to break in or shoot through the door. In the building at that time were six other people approximately. As I walked by the window, this crazy man aimed the shot

gun at the glass door. I had to jump back up the stairs in order to avoid being in the line of fire. I did manage to get the lady upstairs and called the police. When the police arrived on the scene, they surrounded this mad man and squatted down behind their cars and told him to drop the shot gun, which he did. They arrested him and took him off—I thought to jail.

When his court case came up, I was called to court to testify. When I arrived at court and his case hearing came before the judge, he was not in court. I found out that he was in a mental hospital and not in jail. It was a further disturbing fact when I found out that he had been released soon thereafter from the mental institution. With the fears growing and mounting with all the disturbance with the slanderous articles coming out in the *Seattle Times* newspaper, with the non-cooperation of the Seattle police department and also the intrusion and/or infiltration of the Aquarian Foundation by authorized agents of governmental agencies, my fears were so heightened that I decided to leave town and go into hiding. I did this in February of 1980. For five months, I hid out, doing my church duties at a distance, until it reached a point where I had to come back to Seattle for several weeks in order to effect the transfer of my department to another state and to get my duties caught up on the tremendous work load that has accumulated in order for the Aquarian Foundation to counteract the negative articles published by the *Seattle Times* concerning the church and its members and its founder, Reverend Keith Milton Rhinehart.

I have since left Seattle, the town I love, and I do not know when or if I will be able to return.

Date: 3/26/81

/s/ Robert Plante  
ROBERT PLANTE

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a  
Delaware corporation, d/b/a  
THE SEATTLE TIMES; WALLA WALLA  
UNION-BULLETIN, INC.; ERIK  
LACITIS and JANE DOE LACITIS;  
JOHN WILSON and REBECCA WILSON;  
JOHN MCCOY and KAREN MCCOY,  
*Petitioners,*

v.

KEITH MILTON RHINEHART, a single  
person; the AQUARIAN FOUNDATION,  
a Washington not-for-profit corporation;  
KATHI BAILEY, a married person,  
LILLIAN YOUNG, a married person,  
TONI STRAUCH, a married person,  
SYLVIA CORWIN, and ILSE TAYLOR, representing  
women who were members of the  
Aquarian Foundation on or after  
March 17, 1978,  
*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of The State of Washington

**BRIEF FOR THE PETITIONERS**

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**November 16, 1983**

## QUESTIONS PRESENTED FOR REVIEW

1. Whether it is constitutional under the First and Fourteenth Amendments for a court to prohibit publication of information learned in the course of civil discovery in the absence of either a showing of specific harm caused by publication or a particularized examination of the need for a restriction upon publication.

2. Whether it is constitutional under the First and Fourteenth Amendments for a court to enter an order prohibiting publication of information learned in the course of civil discovery upon a mere showing of "good cause."

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<i>Kukatash Mining Corp. v. SEC</i> , 309 F.2d 647 (D.C. Cir. 1962) .....	20
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<i>Linmark Associates, Inc. v. Township of Willingboro</i> , 431 U.S. 85 (1977) .....	20
<i>Louis Werner Stave Co. v. Marden, Orth &amp; Hastings</i> <i>Co.</i> , 280 F. 601 (2d Cir. 1922) .....	31
<i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241 (1974) .....	36
<i>Milk Wagon Drivers Union v. Meadowmoor Dairies,</i> <i>Inc.</i> , 312 U.S. 287 (1941) .....	36
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<i>Minneapolis Star &amp; Tribune Co. v. Minnesota</i> <i>Comm'r of Revenue</i> , 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983) .....	14

<i>Montana Human Rights Div'n v. City of Billings</i> , 649 P.2d 1283 (Mont. 1982) .....	33
<i>Moskowitz v. Superior Court</i> , 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982) .....	33
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) .....	11,36,43
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982) .....	23,41,45
<i>National Polymer Products, Inc. v. Borg-Warner Corp.</i> , 641 F.2d 418 (6th Cir. 1981) .....	14
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931) .....	19,32
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976) ..	16,21,22, 37,40,42, 44
<i>Newman v. Graddick</i> , 696 F.2d 796 (11th Cir. 1983) ..	33
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) ..	11,21,22
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971) (per curiam) .....	16
<i>New York Press Publishing Co., Inc. v. McGraw-Hill Publications Co.</i> , 64 A.D.2d 962, 409 N.Y.S.2d 39, 4 Med. L. Rptr. 1819 (1st Dept. 1978) .....	22
<i>Nixon v. Warner Communications, Inc.</i> , 435 U.S. 589 (1978) .....	26
<i>Oklahoma Publishing Co. v. District Court</i> , 430 U.S. 308 (1977) (per curiam) .....	16,17
<i>Olympic Refining Co. v. Carter</i> , 332 F.2d 260 (9th Cir.), cert. denied, 379 U.S. 900 (1964) .....	32
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971) .....	41
<i>Park v. Detroit Free Press Co.</i> , 72 Mich. 560, 40 N.W. 731 (1888) .....	31
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<i>Paul v. Davis</i> , 424 U.S. 693 (1976) .....	41
<i>Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations</i> , 413 U.S. 376 (1973) .....	21
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<i>Reliance Insurance Co. v. Barron's</i> , 428 F. Supp. 200 (S.D.N.Y. 1977) .....	22
<i>Rhinehart v. Seattle Times Co.</i> , 98 Wash. 2d 226, 654 P.2d 673 (1982) .....	<i>Passim</i>
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<i>Rodgers v. United States Steel Corp.</i> , 508 F.2d 152 (3d Cir.) cert. denied, 420 U.S. 969 (1975) .....	14
<i>In re San Juan Star Co.</i> , 662 F.2d 108 (1st Cir. 1981) .....	27,33,43
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<i>Schoen v. Washington Post</i> , 246 F.2d 670 (D.C. Cir. 1957) .....	28
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<i>State ex rel. Bilder v. Township of Delavan</i> , 112 Wis.2d 539, 334 N.W.2d 252 (1983) .....	33
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<i>Tavoulareas v. Piro</i> , 93 F.R.D. 24 (D.D.C. 1981) .....	33
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940) .....	11
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967) .....	11
<i>Times Newspapers, Ltd. (of Great Britain) v. McDonnell Douglas Corp.</i> , 387 F. Supp. 189 (C.D. Cal. 1974) .....	27
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<i>United States v. Dennis</i> , 183 F.2d 201 (2d Cir. 1950), <i>aff'd</i> , 341 U.S. 494 (1951) .....	40
<i>United States v. Exxon Corp.</i> , 94 F.R.D. 250 (D.D.C. 1981) .....	33,41



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<i>United States v. IBM Corp.</i> , 67 F.R.D. 40 (S.D.N.Y. 1975) .....	39
<i>United States v. Tilden</i> , 28 F. Cas. 169 (S.D.N.Y. 1878) (No. 16,520) .....	30,31
<i>In re Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation</i> , 664 F.2d 114 (6th Cir. 1981) .....	33
<i>Ex parte Uppercu</i> , 239 U.S. 435 (1915) .....	26
<i>Village of Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980) .....	23,43
<i>Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976) .....	13,16,41
<i>Waelde v. Merck, Sharp &amp; Dohme</i> , 94 F.R.D. 27 (E.D. Mich. 1981) .....	32
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OTHER AUTHORITIES:

J. Bentham, <i>Rationale of Judicial Evidence</i> (1827) ....	38
A. Bickel, <i>The Morality of Consent</i> (1975) .....	21
Blasi, <i>Toward a Theory of Prior Restraint: The Central Linkage</i> , 66 Minn. L. Rev. 11 (1981) .....	40
Z. Chafee, <i>Free Speech in the United States</i> (1941)....	20
C. Clark, <i>Handbook of the Law of Code Pleading</i> (2d ed. 1947).....	26,28
P. Connolly, E. Holleman & M. Kuhlman, <i>Federal Controls and the Civil Litigative Process: Discovery</i> (Federal Judicial Center 1978) .....	44
<i>Developments in the Law—Discovery</i> , 74 Harv. L. Rev. 940 (1961) .....	26
Dore, <i>Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process</i> , 14 New Eng. L. Rev. 1 (1978) .....	27
P. Dyer-Smith, <i>Federal Examinations Before Trial and Depositions Practice at Home and Abroad</i> (1939).....	26,28
Elliott's <i>Debates on the Federal Constitution</i> (1876) .	22
<i>The Federalist</i> (H. Lodge ed. 1888).....	17
N. Fetter, <i>Handbook of Equity Jurisprudence</i> (1895)..	28
F. Friendly, <i>Minnesota Rag</i> (1981) .....	32

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W. Glaser, <i>Pretrial Discovery and the Adversary System</i> (1968) .....	25
Goldstein, <i>A Short History of Discovery</i> , 10 <i>Anglo-Am. L. Rev.</i> 257 (1981).....	26
Goodhart, <i>Newspapers and Contempt of Court in English Law</i> , 48 <i>Harv. L. Rev.</i> 885 (1935) .....	31
Halsbury, <i>The Laws of England</i> (3d ed. 1954).....	31
T. Hare, <i>A Treatise on Discovery of Evidence</i> (1st Am. ed. 1836).....	29
James, <i>Discovery</i> , 38 <i>Yale L. J.</i> 746 (1929) .....	26
F. James & G. Hazard, <i>Civil Procedure</i> (2d ed. 1977)	26,28
Kaufman, <i>Judicial Reform in the Next Century</i> , 29 <i>Stan. L. Rev.</i> 1 (1976) .....	12
W. Kerr, <i>A Treatise on the Law of Discovery</i> (1870) ..	29
<i>The Life and Selected Writings of Thomas Jefferson</i> (A. Koch & W. Peden eds. 1944).....	23
Liman, <i>The Quantum of Discovery vs. the Quality of Justice: More Is Less</i> , 4 <i>Litigation</i> , Fall 1977, 8.....	44
J. Lofton, <i>Justice and the Press</i> (1966) .....	20
Marcus, <i>Myth and Reality in Protective Order Litigation</i> , 69 <i>Cornell L. Rev.</i> 1 (1983) .....	22,27
Marcus, <i>Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure</i> , 66 <i>Judicature</i> 363 (1983).....	44
R. Millar, <i>Civil Procedure of the Trial Court in Historical Perspective</i> (1952).....	25
Millar, <i>The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure</i> , 32 <i>Ill. L. Rev.</i> 424 (1937).....	25
Murphy, <i>Near v. Minnesota in the Context of Historical Developments</i> , 66 <i>Minn. L. Rev.</i> 95 (1981).....	32
Nellis & King, <i>Contempt by Publication in the United States</i> , 28 <i>Colum. L. Rev.</i> 401 (1928).....	20
Note, <i>Nonparty Access to Discovery Materials in Federal Courts</i> , 94 <i>Harv. L. Rev.</i> 1085 (1981) .....	27

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Note, <i>Rule 26(c) Protective Orders and the First Amendment</i> , 80 Colum. L. Rev. 1645 (1980) .....	18
<i>Papers of Thomas Jefferson</i> (J. Boyd ed. 1954) .....	22
Pike & Willis, <i>The New Federal Deposition—Discovery Procedure</i> , 38 Colum. L. Rev. 1179 (1938) .....	26,28
G. Ragland, <i>Discovery Before Trial</i> (1932) .....	25,26 28,32
<i>Restatement (Second) of Torts</i> (1977) .....	45
J. Story, <i>Commentaries on Equity Jurisprudence</i> (4th ed. 1846) .....	20
J. Story, <i>Commentaries on Equity Pleadings</i> (7th ed. 1865) .....	26,29,30
A. de Tocqueville, <i>Democracy in America</i> (J. Mayer & M. Lerner eds. 1966) .....	14,17
J. Wigram, <i>Points in the Law of Discovery</i> (1st Am. ed. 1842) .....	28

No. 82-1721

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

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THE SEATTLE TIMES COMPANY, a  
Delaware corporation, d/b/a  
THE SEATTLE TIMES; WALLA WALLA  
UNION-BULLETIN, INC.; ERIK  
LACITIS and JANE DOE LACITIS;  
JOHN WILSON and REBECCA WILSON;  
JOHN MCCOY and KAREN MCCOY,  
*Petitioners,*

v.

KEITH MILTON RHINEHART, a single  
person; the AQUARIAN FOUNDATION,  
a Washington not-for-profit corporation;  
KATHI BAILEY, a married person,  
LILLIAN YOUNG, a married person,  
TONI STRAUCH, a married person,  
SYLVIA CORWIN, and ILSE TAYLOR, representing  
women who were members of the  
Aquarian Foundation on or after  
March 17, 1978,  
*Respondents.*

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**On Writ of Certiorari to the  
Supreme Court of the State of Washington**

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The petitioners respectfully pray that this Court vacate the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on December 2, 1982.

## OPINION BELOW

The opinion of the Washington Supreme Court is reported at *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982), and appears in the Joint Appendix at pages 100a through 149a.

## JURISDICTION

The judgment and opinion of the Washington Supreme Court was entered on December 2, 1982, and amended on December 13, 1982. The court denied a timely motion for reconsideration on January 27, 1983. Petitioners filed the Petition For a Writ of Certiorari on April 22, 1983, which this Court granted on October 3, 1983. The Court has jurisdiction under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States and Civil Rule 26(c) of the Washington Rules for Superior Court, which are found in the Appendix to this Brief.

## STATEMENT OF THE CASE

This case arises from an action for defamation and invasion of privacy brought by Keith Milton Rhinehart, head of the Aquarian Foundation, the Foundation, and certain members of the Foundation. Petitioners, who are defendants in the trial court, include the Seattle Times, the Walla Walla Union-Bulletin, and several journalists currently or formerly employed by those newspapers. The action involves articles that the newspapers published in April 1973, February, March, and April 1978, and November 1979.<sup>1</sup>

<sup>1</sup> The articles themselves are not in the record. Portions that are the subject of plaintiffs' suit are attached to their complaint. See Joint Appendix (hereinafter "JA") 20a-29a. The record below also consists of seven volumes of the Clerk's Papers (hereinafter "CP"), one volume of the Supplemental Clerk's Papers ("hereinafter SCP"), and two volumes of the Second Supplemental Clerk's Papers (hereinafter "SSCP").



### **Pleadings.**

Plaintiffs alleged that the defendants had falsely and with actual malice portrayed Rhinehart and his Foundation as religious and financial charlatans. They contended that defendants' coverage of their activities had damaged their reputation, created shame, humiliation, and embarrassment among certain individual members of the Foundation, caused a loss in Foundation membership, increased the Foundation's expenses, impaired Rhinehart's ability to communicate with Foundation members, and caused a decline in contributions and donations from members and the public.

Plaintiffs sought \$14,100,000 in damages, claiming that they were defamed by newspaper disclosures that Rhinehart is a "Jim Jones Guyana-like leader" of a "bizarre Seattle cult" who demands that his followers worship him but who is "unfit to be a religious leader," that Rhinehart's public exhibitions are "consciously perpetrated frauds" and his seances a "ripoff," that the Foundation is, in fact, Rhinehart's "alter ego," with "no segregation of money or contributions" between Rhinehart and the corporation, that the Foundation uses its "wealth to buy religious converts," and that Rhinehart makes his money "by selling fraudulently-produced stones" and "dime store jewelry" as "apported" gems for "thousands of dollars." (JA 7a-9a.) Plaintiffs also attacked defendants' description of a so-called "religious program" presented in 1978 to inmates at the Walla Walla State Penitentiary "during which Keith Milton Rhinehart appeared costumed in women's clothing." (JA 12a.)

In their answer (JA 32a-36a), defendants denied that plaintiffs had suffered any defamation or invasion of privacy. They asserted that the articles were substantially true and accurate and that publication was privileged and protected from liability by the United States and the Washington constitutions.

### **Discovery Problems.**

The Protective Order arose from the Seattle Times's efforts to wrest discovery from Rhinehart about the allegations in his complaint. The initial discovery provided by Rhinehart was incomplete. For example, although he claimed substantial

damages for the loss of membership and contributions to the Foundation (CP 502-503), Rhinehart refused to provide information about these claims (CP 511-514). He also refused to produce requested documents, claiming (*inter alia*) that his own copyright prohibited him from making any copies available (CP 359). Arguing that they were "severely hampered by . . . Rhinehart's efforts to place obstacles in the way of any discovery which might cast light on the veracity of the Seattle Times's accounts of him, his colleagues, and his organization" (CP 345), defendants moved for an order compelling discovery (CP 365-367). In support of their motion, defendants noted that the principal discovery battle involved "plaintiffs' refusals to permit any effective inquiry into their financial affairs" and asserted that such "material is of crucial importance and relevance to this proceeding." (CP 350.)

#### **Motion for Protective Order.**

Plaintiffs resisted the motion and sought a protective order to bar defendants from publishing anything learned in the course of civil discovery. To further limit coverage by the newspapers, plaintiffs argued:

[T]he defendants should be prohibited from using information which they have obtained through discovery, even though the same information may have been obtained independently without first establishing to the satisfaction of the court that there was a truly independent source for the information.

(SSCP 127.)

#### **Defendants' Response.**

The Seattle Times argued that the proposed order would be an unconstitutional prior restraint and that the threat to First Amendment rights was "aggravated by the fact that these orders are requested in the context of a libel action which, itself, seeks to punish the defendants for prior publications, and which has an inherent (and presumably intended) effect of chilling future exercise of First Amendment rights." (CP 326.)

Defendants submitted a copy of a recent Seattle Times article by defendant Erik Lacitis, in which he discussed allegations that Rhinehart and the Foundation had "systematically

brought lawsuits against any members who tried to leave, or who might have damaging information" in "an attempt to insure their silence," that they "have routinely sued various members of the public media" to force their silence as well, and that the current lawsuit represents "an effort by Rhinehart to harrass and intimidate the press from writing about him." (CP 335.) A protective order in these circumstances, defendants argued, would transform the indirect impact on First Amendment rights resulting from the lawsuit into a direct halt to all news coverage of plaintiffs' activities.<sup>2</sup>

### **Initial Ruling.**

The court ruled that defendants were entitled to discovery into the merits of plaintiffs' claims, including information relating to plaintiffs' finances and to alleged membership, contribution, and donation losses (JA 66a-88a). The court denied the motion for a protective order, without prejudice to plaintiffs' right to move for such an order with respect to specific discovery materials and a factual showing under *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). The court also held that plaintiffs must answer certain of the interrogatories.

### **Plaintiffs' Affidavits for Reconsideration.**

Plaintiffs moved for reconsideration and again pressed for a protective order (CP 279-281). Plaintiffs submitted several affidavits, which recounted various threats or incidents of violence in the vicinity of the Foundation's offices in Seattle since 1978 and advanced numerous reasons why news coverage of their activities should be curtailed or halted. They attacked defendants' articles and attributed the threats or incidents to the unfavorable publicity in these articles.

Robert Plante, a Foundation employee, filed an affidavit (JA 94a-99a) which declared that "threatening phone calls . . . would begin to filter in" whenever the Seattle Times wrote "an article . . . in reference to the Aquarian Foundation." (JA 97a.) He catalogued a series of incidents, including a 1978 altercation with someone who had visited the Foundation, made verbal

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<sup>2</sup> The Lacitis article is now the subject of another defamation suit, *Rhinehart v. Seattle Times*, No. 82-2-17487-4 (King County Super. Ct., filed Dec. 17, 1982).

threats against Rhinehart, and "opened his shirt to reveal that he was wired with instruments and listening devices." (JA 95a.) He also described a mugging incident, an alleged bombing incident, and two encounters with deranged individuals that had occurred in the neighborhood several years earlier, and accused the Seattle police of not taking his complaints seriously. In 1979, after he and Rhinehart were arrested in Bogota, Colombia, on charges of necromancy and witchcraft, Plante concluded that a Seattle Times reporter "was again feeding false and evil material to the media." (JA 98a.) Plante blamed the "slandorous articles" in the Seattle Times, the "noncooperation" of the Seattle police, "and also the intrusion and/or infiltration of the Aquarian Foundation by authorized agents of governmental agencies" for causing his heightened fears and increased workload and declared that, "because of intense fear and anxiety," he had chosen to leave Seattle, "the town I love, and I do not know when or if I will be able to return." (JA 98a.)

Catherine Harold, the Foundation's secretary, submitted an unsworn affidavit (JA 83a-93a) chronicling the same general list of disturbances. Her affidavit further asserted:

Upon information and belief and knowledge of the numerous death threats directed toward the Aquarian Foundation, it's [sic] members, and it's [sic] founder since the publication of false and defamatory articles about them in the *Seattle Times* and the *Walla Walla Union Bulletin*, the Affiant is of the opinion that this incident [a drawing of a skull and cross-bones and an eight ball] . . . is another attempt to seriously torment and harm the Aquarian Foundation, it's [sic] founder, and it's [sic] members that would not have occurred had the aforesaid articles not been published.

(JA 92a.)

The Affidavit of Linda Dunn (JA 45a-48a) declared that since 1978 the Foundation had received several threatening telephone calls and had also encountered several deranged members of the public. As a result of unfavorable publicity, she

added, attendance at Foundation events had steadily declined. Because she knew of "no threatening incidents" prior to defendants' publication of articles about Rhinehart in 1973, Dunn declared that the incidents had all occurred "as a direct result of all said articles." (JA 48a.)

### **Defendants' Constitutional Arguments.**

The Seattle Times responded by again outlining the constitutional deficiencies in plaintiffs' arguments (CP 212-253) and arguing that the affidavits represented "an unprecedented and completely unconstitutional attempt to halt any and all public commentary on the activities of this self-proclaimed religion." (CP 218.) Reminding the court that the First Amendment required that plaintiffs make a "particular and specific demonstration of fact" (CP 216) before a court could abridge expression, defendants asked the court to adhere to its earlier ruling.

Defendants also submitted an affidavit (CP 130-211) attesting to the relevance and importance of Rhinehart's financial data to their case. The affidavit alleged that "significant amounts of funds are paid to Rhinehart over and above his salary" from the Foundation, that Rhinehart was "soliciting funds from members to retire a mortgage against a condominium he owns," and that Rhinehart personally derives significant cash flow from his "gemstone program," in which he sells "allegedly sacred objects" in return for substantial cash contributions from members (CP 131-133).

### **Protective Order.**

On June 12, 1981, the court issued its Opinion Granting Plaintiffs' Motion for Protective Order (JA 51a-54a). The court concluded that plaintiffs had shown "reasonable grounds for the issuance" of a protective order prohibiting defendants from publishing any information learned in discovery about plaintiffs' "financial affairs" and various individuals' names and addresses (JA 53a).

Protective orders, the court noted, "are entered routinely . . . where the party seeking the Protective Order has a reasonable basis for its request. . . ." (JA 52a.) The court observed



that protective orders were adopted "in the first place" to promote "production of information normally kept confidential" and "to protect a party from abuse or embarrassment." (JA 54a, 52a.) The court reasoned:

If Protective Orders are not available, it could have a chilling effect on a party's willingness to bring his case to court. If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as can result from an impingement upon First Amendment rights. I would put access to the courts on an equal plane of importance with freedom of the press because it is through the courts that our fundamental freedoms are protected and enforced.

(JA 54a.)

On June 26, 1981, the court entered the Protective Order (JA 64a-65a). The order listed certain categories of information that "defendants . . . shall make no use of . . . other than such use as is necessary in order to . . . prepare and try the case." The order also declared broadly that "information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination." The order contained no provision concerning its duration or its application to materials available in public records or revealed in open court.

#### **Appeal Proceedings.**

On December 2, 1982, the Washington Supreme Court upheld the Protective Order. Analyzing the Protective Order as a classic prior restraint, five members of the court nonetheless rejected petitioners' First Amendment arguments and held that "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification" for the restraint in question (JA 130a). Where civil discovery is involved, the court concluded, freedom of expression may be abridged "if the moving party shows that any of the harms spoken of in the rule [*i.e.*, annoyance, embarrassment, oppression, or undue burden or expense] is threatened



and can be avoided without impeding the discovery process." (JA 130a.) Justices Utter and Pearson dissented, arguing that no specific harm had been identified, that First Amendment interests were given no recognition, and that "the order does not reflect the narrowness which derives from a concern for such interests." (JA 149a.)

## SUMMARY OF ARGUMENT

Litigants do not surrender their First Amendment rights at the courthouse door. The First Amendment includes the right to discuss publicly and truthfully all matters of public concern, including information relating to pending lawsuits, even if it originates during civil discovery and even if it is factual in nature. Civil litigation is itself a newsworthy matter and frequently involves matters of public concern. In the area of defamation, where the cause of action is premised upon allegations that the public has received false information, the litigants' interest in prompt dissemination of correct information is particularly strong. Because civil discovery functions as an integral element of the judicial system, public interest in dissemination of information can be presumed.

The fact that plaintiffs obtained the order enjoining publication in the course of their defamation action aggravates the damage to First Amendment values. Plaintiffs have managed to obtain unprecedented injunctive relief for defamation. Furthermore, contrary to the assumptions of the Washington Supreme Court, unfavorable publicity is the essence of what the First Amendment was designed to protect. Even where publicity might embarrass or annoy a litigant, the state cannot rely upon that justification to support an abridgment of free expression. Because pretrial discovery is a presumptively public process, the court must give appropriate recognition to First Amendment interests.

The Washington Supreme Court refused to determine whether this particular instance required a ban on publication and instead examined only the general governmental interests which justify "protective orders in circumstances such as these."

(JA 105a.) Although the state possesses the authority to control conduct that tends directly to prevent discharge of judicial functions, it must advance a compelling interest to support any infringement of the rights of free speech and expression and must demonstrate that the infringement is narrowly tailored to serve that interest. Freedom of expression, accordingly, must be given the widest possible range compatible with the essential requirement of a fair and orderly administration of justice. Generalized and speculative arguments, unsupported by evidence, are plainly insufficient to justify the restraint here.

Petitioners ask this Court to protect their legitimate First Amendment interests in dissemination of newsworthy information acquired during the course of civil discovery. When a protective order seeks to limit expression, it may do so only if the proponent shows a compelling governmental interest. Mere speculation and conjecture are insufficient. Any restraining order, moreover, must be narrowly drawn and precise. Finally, before issuing such an order a court must determine that there are no alternatives which intrude less directly on expression. The order below is plainly deficient and should be vacated.

## **ARGUMENT**

### **I.**

#### **PETITIONERS POSSESS A SUBSTANTIAL FIRST AMENDMENT RIGHT TO DISSEMINATE NEWSWORTHY INFORMATION**

##### **A. The First Amendment Protects The Right To Discuss Litigation And Other Matters Of Public Concern.**

The Washington Supreme Court determined that discussion of any information uncovered in pretrial proceedings is presumptively illegitimate because civil discovery is a private process (JA 106a-109a). The basis for its conclusion is not altogether clear, since the court asserted variously that petitioners' First Amendment interests could be disregarded because they were litigants subject to judicial control, because the information was purely factual in nature, and because news

coverage of religious groups was not of legitimate interest to the public. The court held that freedom of expression in these circumstances would be tolerated only insofar as it "will in any way tend to promote the proper functioning of [pretrial] proceedings." (JA 129a.) Although it acknowledged that the information would be newsworthy if it were published, the court reasoned that civil litigants must be granted protective orders to prevent any "unwanted publicity" arising from their lawsuits (JA 128a).

This narrow view of the First Amendment contrasts sharply with the broad system of freedom of expression that this Court has articulated. The First Amendment "embraces . . . the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). See also *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1971); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). The right to disseminate information learned in civil litigation is rooted in the basic First Amendment "principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). When there is "information of potential interest and value to a diverse audience," the First Amendment protects the right to communicate that information. *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

Lawsuits are themselves newsworthy and frequently involve matters of public concern. This Court has characterized civil litigation as a "means of communicating useful information to the public." *In re Primus*, 436 U.S. 412, 431 (1978). Furthermore, this Court has held that civil litigation is itself a First Amendment activity. *NAACP v. Button*, 371 U.S. 415, 429 (1963). As our society has become increasingly regulated and litigious, civil litigation has become a major focus of public inquiry and concern. When litigants invoke the judicial process, they are participating in a public function. Public issues often first emerge in private litigation, such as labor-management disputes, lawsuits over toxic torts and occupational diseases, securities and antitrust matters, products liability actions, discrimination claims, consumer cases, bankruptcy proceedings, and even controversies involving major league sports franchises

and players. *See generally Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-80 (6th Cir. 1983). The public has a keen interest not only in the outcome of such litigation but also in any newsworthy information generated by those lawsuits.<sup>3</sup>

The Washington Supreme Court's pronouncement that the public generally does not have much interest in the conduct of civil actions or in knowing what information is uncovered in such actions (JA 127a-129a) reveals an unnecessarily cramped view of what are matters of public concern. The activities of a religious organization is clearly of public interest, particularly when that organization aggressively proselytizes, seeking both recruits and financial contributions from the general public. The Washington Supreme Court assumed that it is only when the activities of a religious organization descend to the level of criminal conduct that the general public has any legitimate interest in its affairs (JA 129a). But surely this cannot be, especially when the organization itself admits that it relies on appeals to the general public for continuing financial support (JA 9a). If plaintiffs' organization targets the general public, then the public has a right to be informed about the nature and conduct of that organization in order to make an informed choice whether to lend or withhold support. This Court has held that a consumer of drugstore items has a right of access to information that will enable him to make a reasoned choice.

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<sup>3</sup> Given today's crowded civil dockets, routine issuance of restrictive protective orders would permit information to remain concealed for many years. *See In re Halkin*, 598 F.2d 176, 193 n.40 (D.C. Cir. 1979); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) (en banc) (per curiam); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975), *cert denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). "Fragile First Amendment rights are often lost or prejudiced by delay." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 470 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). In *Bridges v. California*, 314 U.S. 252, 268 (1941), this Court recognized that a restriction on pretrial discussion often produces its "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height." Because the overwhelming majority of civil cases are settled prior to trial, *see Kaufman, Judicial Reform in the Next Century*, 29 Stan. L. Rev. 1, 1 (1976), broad inhibitions upon pretrial commentary would also have potentially irreparable effects.

*Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). This principle can be no less applicable when the consumer is asked to buy a package of religious beliefs, an ideological commitment, a loyalty to a charismatic leader, and a code of conduct.

In a defamation lawsuit, particularly, where the cause of action itself is premised upon allegations that the public has received false information, the plaintiff, the defendant, and the public all have an interest in prompt determination of the truth or falsity of matters already in the public domain. This Court has stated that the "first remedy" for any falsehood is "self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). As Justice Brandeis observed, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). In these circumstances, freedoms of speech and publication have a vital role in generating prompt and accurate information.

**B. Petitioners' Status As Litigants Does Not Create An Exemption From First Amendment Requirements.**

Lawyers and litigants are often the best informed and, indeed, the most accurate—sources of information about pending civil litigation. The parties themselves, with their opposing interests and their close involvement with the issues, are ideally situated to provide balanced and full factual data on all matters of public interest relevant to pending litigation. When a protective order silences one side of the discussion while leaving the other free to canvass and proselytize, as was done here, the public is effectively denied its First Amendment right to receive information on matters of public interest and concern. See *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 756-57.

That the Protective Order arose in civil litigation does not preclude the application of the First Amendment. Courts exercise broad supervisory authority over the conduct of civil discovery and other pretrial proceedings but neither the "broad



management powers" granted by court rules nor the "general authority to regulate the conduct of litigation" creates an exception to basic principles underlying freedom of expression. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). As the Third Circuit observed in a similar context, the general judicial interest "in the proper administration of justice does not authorize any blanket exception to the First Amendment." *Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 420 U.S. 969 (1975). This Court recently noted in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365, 1376, 75 L. Ed. 2d 295, 309 (1983), that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."

That the Seattle Times was drawn into litigation by Rhinehart does not alter basic constitutional principles. See *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981) ("mere status of involvement in a lawsuit" does not limit First Amendment rights); *CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975) (per curiam) (gag order of litigants is "presumptively void" under First Amendment). If "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), it seems axiomatic that "lawyers and litigants [do not] surrender their First Amendment rights at the courthouse door." *In re Halkin*, 598 F.2d 176, 186 (D.C. Cir. 1979). Moreover, many political questions in the United States are resolved as judicial questions. A. de Tocqueville, *Democracy in America* 248 (J. Mayer & M. Lerner eds. 1966). First Amendment protection in these circumstances should be consistent with the broad role civil litigation plays in our increasingly complex society.<sup>4</sup>

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<sup>4</sup> The state's legitimate interest in upholding the integrity of its judicial processes does not require that parties automatically waive or abandon the protections of the First Amendment when they become involved in civil litigation. See *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (although state has legitimate interest in integrity of its electoral processes, a political candidate does not lose the protections of the First Amendment when he runs for office).



The existence of broad judicial authority to manage litigation does not dispose of First Amendment concerns. For example, although the state has "broad power" to regulate attorneys, this Court has held that when judicial rule-making sweeps so broadly as to affect the exercise of First Amendment freedoms, the state must demonstrate that it has a compelling interest and that the means it employs to further that interest are "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *In re Primus*, 436 U.S. at 422, 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

### C. The Order Restricts Protected Speech.

The information affected by the Protective Order does not fall within any of the historic and well-established categories of unprotected speech. These "well-defined and narrowly limited classes of speech," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942), include so-called fighting words, *id.* at 572; obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973); incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); and, to a limited extent, commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-63 (1980); and some types of defamatory falsehoods, *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. Significant First Amendment interests attach to information revealed in the course of civil discovery because such information cannot be characterized as "a class of utterances of 'no essential part of any exposition of ideas' or of 'slight social value as a step to truth.'" *Halkin*, 598 F.2d at 188 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572).

Facts are a basic element of expression and the publication of factual data unaccompanied by "advocacy or abstract discussion" (JA 122a) is well within the protection of the First Amendment. Freedom of expression cannot survive on advocacy alone. To be effective, advocacy should be informed, not ignorant. As this Court has noted, the "informational purpose of the First Amendment" requires that "public debate must not only be unfettered; it must also be informed." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978)

(quoting *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting)). Suppressing words risks suppressing ideas. *Cohen v. California*, 403 U.S. 15, 26 (1971). The suppression of facts can result in even greater injury. The decisions of this Court have repeatedly stressed that, even where information is purely factual, its publication is constitutionally protected. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). "Purely factual matter of public interest may claim protection" under the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 762.

The fact that the information at issue originated in compulsory judicial processes does not alter these basic principles. There is no special mystique about the civil discovery process that distinguishes it from other sources of newsworthy information.<sup>5</sup> "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ." *First National Bank of Boston v. Bellotti*, 435 U.S. at 778. Thus, in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), this Court held that a restraining order to block publication of stolen government documents relating to the history of the Vietnam War was unconstitutional. The right to publish should be "far stronger" where relevant and newsworthy information is lawfully obtained through civil litigation. *Halkin*, 598 F.2d at 188; see *Smith v. Daily Mail*, 443 U.S. at 101-04.

The fact that the information emerged in compulsory judicial processes does not warrant denying First Amendment protection. In *Nebraska Press* this Court struck down a pretrial order forbidding disclosure of testimony given or evidence adduced during pretrial criminal proceedings, including con-

<sup>5</sup> This is not a case where litigation was commenced or discovery was pressed simply to obtain information for publication. The lower court has held: "All of the evidence covered by the order compelling discovery was relevant to the plaintiffs' claims and the defense of those claims . . ." (JA 132a.)

fessions introduced in open court at arraignment, other admissions by the defendant, the contents of a document obtained by the prosecutor, portions of the medical testimony at a preliminary hearing, and the names of certain victims. Although most of this information would not have been available but for the operation of the criminal justice system, the Court concluded that the right to disseminate it was protected by the First Amendment and that any order forbidding publication was "clearly invalid." 427 U.S. at 570.

Other decisions of this Court acknowledge that a state cannot constitutionally curb publication of news and other information merely because it originates in judicial proceedings. In *Smith v. Daily Mail*, 443 U.S. at 103, the Court held that even in "situations where the government itself provided or made possible press access to the information," a state cannot subject to criminal penalties the truthful publication of information from court records. Similarly, in *Oklahoma Publishing Co. v. District Court*, 430 U.S. at 311-12, the Court concluded that a state could not prohibit dissemination of the names of individuals that are disclosed during juvenile court hearings. Moreover, the Court implicitly acknowledged in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), that the First Amendment protects freedom of publication, even when the information derives from confidential preliminary proceedings that take place before the filing of any formal complaint.

Pretrial discovery is an integral part of the American judicial process, which involves the "common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). The state may not evade this principle simply by characterizing civil litigation as a wholly private matter of no legitimate concern to the public. The boundaries between private lawsuits and public issues are not so easily drawn in our system of jurisprudence. As de Tocqueville observed, courts in the United States intervene in public affairs by chance, when private litigants seek the assistance of the judiciary to decide particular cases and controversies. See de Tocqueville at 89-93. See also *The Federalist* No. 51, at 324 (J. Madison) (H. Lodge ed. 1888)

("the private interest of every individual may be a sentinel over the public rights").

Moreover, because much of the information communicated in civil discovery is generally available in public court files,<sup>6</sup> a First Amendment interest in such information may be presumed:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of the government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records opened to public inspection.

*Cox Broadcasting*, 420 U.S. at 495. See also *Smith v. Daily Mail*, 443 U.S. at 102-04. See generally Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645, 1655-56 (1980).

**D. The Fact That This Order Was Obtained In A Defamation Action Aggravates The Damage to First Amendment Values.**

It is particularly disturbing that plaintiffs obtained the Protective Order in an action for defamation and invasion of

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<sup>6</sup> Much of the information covered by the Protective Order, including extensive data relating to plaintiffs' financial affairs, is available in the public files of this Court (CP 377-703), although, under the terms of the Protective Order, petitioners (but no one else) are forbidden to publish, disseminate, or "use" any of this material.

privacy, in which they seek a massive monetary judgment for past publications about their activities. Rhinehart sought entry of this order not to limit dissemination of any specific information or documents, as protective orders are often designed to do, but to prevent further public discussion about him and his group. By halting much of the newspaper commentary at the outset of the lawsuit in order to avoid subjecting Rhinehart to "any exposure which he deems offensive" (JA 110a), the Protective Order effectively grants plaintiffs extraordinary and unprecedented injunctive relief.

Plaintiffs' affidavits themselves reveal that they sought the Protective Order in order to prevent further newspaper commentary. For example, the Rhinehart affidavit declared:

Since the writing and publishing of numerous articles the subject matter of this cause of action, the staff of the Aquarian Foundation, its members, and I have been subjected to numerous threats of violence in the form of telephone threats and personal appearances of unnamed individuals. These threats have occurred at both the Aquarian Foundation offices and my personal residence in Seattle, Washington.

(JA 40a-41a.) Avalos, in her affidavit, asserted that the incidents occurred "as a result of the Walla Walla Union-Bulletin and Seattle Times articles." (JA 43a.) The Dunn Affidavit also averred that the incidents arose as a direct result of the articles. (JA 45a-46a, 48a.) Similarly, Harold testified that the incidents "occurred after" publication of defendants' articles and "would not have occurred had the . . . articles not been published." (JA 83a, 92a.) It is clear that plaintiffs sought to eliminate further critical commentary by the Seattle Times about their activities.<sup>7</sup>

By relying upon the problems that resulted from the allegedly defamatory articles as the basis for their Protective

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<sup>7</sup> If plaintiffs had not managed to obtain this order as a result of their own lawsuit, which enabled them to invoke the broad language of Wash. CR 26(c), it is clear that the affidavits would be constitutionally insufficient to support the injunctive relief obtained. *See Near v. Minnesota*, 283 U.S. 697, 709 (1931) (prior restraint cannot be exercised to prevent publications tending "to disturb the peace of the community").



Order, plaintiffs have, in effect, obtained judicial assistance in enjoining a libel.<sup>8</sup> Such an exercise of judicial prerogative is inconsistent with the fundamental premises of a free society. As Justice Story long ago recognized:

Courts of equity . . . have never assumed, at least, since the destruction of the Court of Star Chamber, to restrain any publication, which purports to be a literary work, upon the mere ground, that it is of a libellous character, and tends to the degradation or injury of the reputation or business of the plaintiff, who seeks relief against such publication. For, matters of this sort do not properly fall within the jurisdiction of Courts of Equity to redress; but are cognizable, in a civil or criminal suit, at law. . . .

2 J. Story, *Commentaries on Equity Jurisprudence* § 948a at 282 (4th ed. 1846). The issues dramatized in this case are similar to those faced during the early decades of the Republic, where libel actions were sometimes accompanied by a harsh exercise of "inherent" judicial power to punish "false, scandalous and malicious" publications during the pendency of the action. See J. Lofton, *Justice and the Press* 14-19 (1966); Z. Chafee, *Free Speech in the United States* 18-21 (1941); Nellis & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 401, 401-15 (1928).

Recognizing that a defamation action inherently poses greater dangers to First Amendment values than other litigation, this Court has refashioned the elements of the cause of action itself in order to insure that "uninhibited, robust, and wide-open" debate upon public issues is not unnecessarily

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<sup>8</sup> Equity does not enjoin a libel. See *Kukatash Mining Corp. v. SEC*, 309 F.2d 647, 651 n.2 (D.C. Cir. 1962). The impact of the Protective Order is broader because it bars the publication of even presumably truthful information about Rhinehart and his group. Rhinehart's concern that dissemination of such material would somehow inhibit his flow of contributions, donations, and membership is misplaced. It is precisely such individual decision-making that the First Amendment encourages. See *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977). As Justice Brandeis has stated, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).



throttled. *New York Times Co. v. Sullivan*, 376 U.S. at 270. In the *Sullivan* case, the Court drew upon the historical controversy over seditious libel, "which first crystallized a national awareness of the central meaning of the First Amendment," and devised new rules for defamation actions which would insure that the elements of common law defamation would not impose a "pall of fear and timidity . . . upon those who would give voice to public criticism." *Id.* at 273, 278. A defamation plaintiff's pretrial order aimed at halting, in the words of the Washington Supreme Court, "[u]nfavorable publicity" (JA 106a) results in a similar chilling effect upon speech protected by the First Amendment.<sup>9</sup>

The damage to First Amendment values caused by entry of the Protective Order is not limited to the "direct and immediate" impact, *Bernard v. Gulf Oil Co.*, 619 F.2d at 469, of outlawing constitutionally protected expression. The dangers of direct restraint on speech often include indirect "suppression of speech . . . by inducing excessive caution in the speaker." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). As one court has noted, significant problems arise even where a gag order is limited only to information acquired during civil discovery:

A judicial order restraining speech casts the judge in a role comparable to that of a censor. To escape the sanctions associated with violating the order, the speaker is inevitably led to clear his expression with the judge in advance and the speaker bears the burden of proving that the expression is inoffensive.

*Halkin*, 598 F.2d at 184 n.15. The result is, as plaintiffs perhaps intended, that newspaper coverage of their group is curtailed and the public is denied pertinent factual information.

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<sup>9</sup> To the extent that the Protective Order resembles the archetypal prior restraint, it does not merely "chill" speech but also "freezes" it. See *Nebraska Press*, 427 U.S. at 609 (quoting A. Bickel, *The Morality of Consent* 61 (1975)).

In the peculiar context of defamation litigation, where the very subject at issue is the truth or falsity of published information already available to the general public, a pretrial restriction on publication is particularly offensive to First Amendment values. See *Marcus, Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 65 (1983). Accordingly, lower courts have applied a particularly stringent analysis in weighing the justifications advanced for such orders. See *Reliance Insurance Co. v. Barron's*, 428 F. Supp 200 (S.D.N.Y. 1977); *New York Press Publishing Co. v. McGraw-Hill Publications Co.*, 64 A.D.2d 962, 409 N.Y.S.2d 39, 4 Med. L. Rptr. 1819 (1st Dept. 1978) *Georgia Gazette Publishing Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981) (applying state constitution).

#### E. "Unfavorable Publicity" Is the Essence of Freedom of Expression.

The First Amendment was designed to promote "freedom of expression in the political arena and the dialogue in ideas," despite the "risks to private rights from an unfettered press." *Nebraska Press*, 427 U.S. at 547. As Madison observed during the Constitutional debates, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates on the Federal Constitution* 571 (1876), quoted in *New York Times Co. v. Sullivan*, 376 U.S. at 271. Jefferson, writing in 1786, complained about press attacks:

In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . .

9 *Papers of Thomas Jefferson* 239 (J. Boyd ed. 1954), quoted in *Nebraska Press*, 427 U.S. at 548. Thus, the "[u]nfavorable publicity" which the Washington Supreme Court viewed as one of the "harmful side effects" of civil litigation that requires

issuance of restrictive orders (JA 106a), is, in fact, the essence of free expression.<sup>10</sup>

The exercise of First Amendment freedoms is especially compelling in this case, in which a so-called "spiritualist church" seeks through the Protective Order to limit public discussion of its financial practices while it solicits funds from the public. In his *Notes on Virginia*, written in 1782, Jefferson commented upon the operations of religious groups where there is no established church:

They flourish infinitely. Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order; or if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the State to be troubled with it. . . .

*The Life and Selected Writings of Thomas Jefferson* 276-77 (A. Koch & W. Peden eds. 1944).

If, as respondents claim, Rhinehart has the power to communicate with the dead, then surely the public has an interest in his activities. If he does not, or if (in Jefferson's words) his organization's "tenets would subvert morals," then "good sense" is hampered by restricting information critical to those issues. No doubt many considered the religious cult of Reverend Jim Jones simply an example of "the bizarre and the unorthodox" (JA 129a), but when the members of that group committed mass suicide on the orders of their leader, the public asked who those people were, why they joined that group, and what caused them to follow Jones with such blind devotion. To many, the answers to these questions provided valuable insights into contemporary American religious, cultural, and social

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<sup>10</sup> The Washington Supreme Court reasoned that dissemination of this information could be halted merely to remove all possibility of "annoyance, embarrassment and even oppression" from civil litigation (JA 131a). While that may be a laudatory goal, this Court has held that "[s]peech does not lose its protected character . . . simply because it may embarrass others . . ." or because it is "offensive." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-11 (1982). See also *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636 (1980) (expression cannot be prohibited because of alleged "undue annoyance").

values. The activities and the *bona fides* of controversial religious figures are matters of legitimate public interest and the information covered by the Protective Order entered below is important and should not be casually suppressed.

The Washington Supreme Court's decision, by permitting Rhinehart to obtain the Protective Order merely to avoid all "unwanted publicity" or to stop "any exposure which he deems offensive" (JA 128a, 110a), presents additional First Amendment dangers. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). To delegate such discretion to individual litigants without appropriate constitutional safeguards would effectively permit speech to be silenced solely "as a matter of personal predilections." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (quoting *Cohen v. California*, 403 U.S. at 21).

Such problems are aggravated in these particular circumstances. This Court has held that granting any religious group the power to curtail public "contempt, mockery, scorn and ridicule" is directly inconsistent with dictates of the First Amendment:

[F]rom the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (footnote omitted). Cf. *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982) (state cannot delegate zoning decisions to churches).

#### **F. Civil Discovery Is a Presumptively Public Process.**

Publicity is not, as the Washington Supreme Court assumed, a "cloud" (JA 128a) upon the integrity of pretrial

procedure. Despite the court's assertions that civil discovery "did not come into its full flower" until recent years (JA 105a) and that any public dissemination of information learned in discovery is *per se* illegitimate, compulsory pretrial disclosure between the parties is an ancient and traditionally public process. The proceedings that developed into our modern discovery procedures were, in fact, enmeshed in the public pleadings. See W. Glaser, *Pretrial Discovery and the Adversary System* 15-25 (1968). Even today, the complaint and answer, depositions, and responses to interrogatories, requests for admission, and requests for production are generally found in the public files.

Both common law and equity relied upon detailed pleadings as the primary basis for discovery. According to one observer:

Written pleadings formed the traditional basis of preparation for trial in courts of common law. The chief objective of common law pleading was the production of a single issue which might be tried by the jury. The facts of the controversy were supposed to be narrowed down to a single issue from the respective allegations of the parties . . . As has been said, "refinements of pleading grew up on the court's passive willingness to let issues emerge out of the allegations recited to it by contending pleaders in antiphonal rivalry, and the stilted form which written pleading eventually assumed was born of the tradition of care with which every statement in one's opponent's pleading had to be met to the court's satisfaction without disclosing to that opponent too much of one's own case."

G. Ragland, *Discovery Before Trial* 1-2 (1932) (footnote omitted). Equity made several explicit discovery devices available, Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 Ill. L. Rev. 424, 441 (1937); R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 204 (1952), but, as in the common law courts, civil discovery emerged in the interstices of the pleading process:



Pleadings and discovery proper were commingled in equity pleadings. The result was that pleading in equity assumed the form of a detailed statement of the party's evidence.

Ragland at 15. See generally *Developments in the Law-Discovery*, 74 Harv. L. Rev. 940 (1961). The pleadings were composed of sworn interrogatories, J. Story, *Commentaries on Equity Pleadings* § 35 (7th ed. 1865), and the pleading process was the equivalent of the modern trial.<sup>11</sup>

The historical antecedents of modern discovery practice were documents that were generally available for public inspection and review. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 602 (1978) (recognizing common-law presumption of public access); *Ex parte Uppercu*, 239 U.S. 435, 439-41 (1915) (recognizing common law right). Modern discovery practice has changed nothing in this tradition of openness merely by simplifying the procedures, clarifying the scope, and moving much of pretrial case management from the pleading process to various discovery devices.<sup>12</sup> As this Court

<sup>11</sup> In equity, suits were ultimately resolved on the basis of sworn affidavits and pleadings and "[n]o formal trial with witnesses was ordinarily had," C. Clark, *Handbook of the Law of Code Pleading* § 5 at 16 (2d ed. 1947). The contents of the court file constituted the functional equivalent of the trial. See F. James & G. Hazard, *Civil Procedure* § 6.1 (2d ed. 1977). Thus, there was no formal dichotomy between discovery and trial. Pretrial discovery procedure developed the written record of testimony upon which the Chancellor could render a verdict. See Goldstein, *A Short History of Discovery*, 10 Anglo-Am. L. Rev. 257, 259 (1981). See generally James, *Discovery*, 38 Yale L.J. 746 (1929).

<sup>12</sup> As the Court noted in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), the Federal Rules of Civil Procedure altered the federal discovery process by enabling a litigant to seek information relevant to his opponent's case as well as his own. Another innovation was the addition of the deposition to the arsenal of discovery devices. See P. Dyer-Smith, *Federal Examinations Before Trial and Depositions Practice at Home and Abroad* §§ 18, 57 (1939); Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 Colum. L. Rev. 1179, 1436 (1938). It is difficult to understand how such minor improvements, significant though they may be in increasing the efficiency of the discovery process, could be the basis for suddenly establishing a contrary presumption, namely, that publication would thenceforth be *per se* wrongful. Governmental efficiency may not be pursued at the expense of constitutional protections. See *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

has noted, a basic presumption of openness is significant in constitutional terms "not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (quoting *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment)).<sup>13</sup>

Contrary to the Washington Supreme Court's assertion that modern discovery practice suddenly opened "[a] realm of privacy which courts had previously left undisturbed" (JA 110a), the traditional bill of discovery inquired into private matters, which thereby became public. Indeed, any information equally available to both parties, such as public records, was not a proper subject for a bill of discovery. See, e.g., *Baker v. Biddle*, 2 F. Cas. 439, 450 (C.C.E.D. Pa. 1831) (No. 764).

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<sup>13</sup> Although much of petitioners' historical analysis concentrates on public rights of access to pretrial discovery materials, the instant case is more narrowly framed. In this case, because petitioners have been granted access under Wash. CR 26(b)(1), the right of access is not at issue. See *Smith v. Daily Mail*, 443 U.S. at 105-06. Because the question posed is purely the freedom of publication where newsworthy information has been lawfully obtained, this Court need not reach the issue of whether there exists a general First Amendment right of public access to pretrial discovery information. See, e.g., *In re San Juan Star Co.*, 662 F.2d 108, 113-116 (1st Cir. 1981) (holding that third parties have First Amendment right of access to transcripts of pretrial depositions); *Times Newspapers Ltd. (of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 194-96 (C.D. Cal. 1974) (holding that First Amendment conferred no right for third parties to attend depositions). See also *CBS, Inc. v. Young*, 522 F.2d at 237-38 (holding that non-party has standing to challenge protective order); *In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983) (holding that non-party lacks standing to challenge protective order). See generally Marcus at 11-13 (noting practical problems in permitting actual public attendance at depositions); Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1104-05 (1981) (criticizing limitations on access without due regard for public rights); Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 New Eng. L. Rev. 1, 10-17 (1978) (distinguishing access and publication). This Court has generally observed that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

In an early case, the court held that the right to compel production of documents was unavailable where the information was in the public records. *Geyger's Lessee v. Geyger*, 2 Dall. 332, 333 (C.C.D. Pa. 1795). See *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 501-02 (1836). See also P. Dyer-Smith, *Federal Examinations Before Trial and Depositions Practice at Home and Abroad* 54 n.75 (1939); N. Fetter, *Handbook of Equity Jurisprudence* 320 n.6 (1895). Although modern pleading and procedural reforms have altered the manner in which litigants obtain pretrial information, formal discovery is still only one element of a public process for narrowing and refining civil controversies.<sup>14</sup>

The scope of discovery has always been much broader than that governing the evidence introduced at trial (JA 116a-117a). As Justice Washington noted in 1818, the question is simply whether the information sought is pertinent to the issue. *Bas v. Steele*, 2 F. Cas. 988, 990 (C.C.D. Pa. 1818) (No. 1088). Equity might refuse to enforce discovery where it was "remote in its bearings upon the real point in issue" or would be "impertinent." J. Wigram, *Points In The Law of Discovery* 166, 168-71 (1st Am. ed. 1842) (emphasis in original). But, according to one commentator:

To resist discovery on this ground, the charge must be so plainly immaterial, or . . . so obviously

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<sup>14</sup> Only with the advent of modern notice pleading was discovery formally separated from the pleadings. In fact, by removing evidentiary facts from the pleading process, pleading reforms made modern discovery procedures necessary. "Detailed pleading does, of course, tend to define the controversy more narrowly and give fuller notice to the adversary than does more general pleading." James & Hazard at 61-62. Pretrial discovery has now replaced the pleadings as the principal means for delineating and narrowing the issues and contentions of the parties. *Id.* at 57; Pike & Willis at 1179-80. According to one observer, because it is difficult "to determine just where to draw the distinction between facts, law, and evidence," modern liberal discovery is "a necessary complement of simplified pleading." Ragland at 261. See also Clark at § 89. Thus, discovery is still only one part of the pretrial process for narrowing the legal issues and factual disputes between the parties. See, e.g., *Schoen v. Washington Post*, 246 F.2d 670, 672 n.4 (D.C. Cir. 1957) (defects in libel complaint may be corrected by use of bill of particulars or by discovery). See also Wash. CR 12(e) (West 1983) (motion for more definite statement).

frivolous, that no state of the case can be supposed in which the answer could be made available. In general, if it can be supposed that the discovery may in any way be material to the plaintiff, the defendant will be compelled to make it.

T. Hare, *A Treatise on Discovery of Evidence* 161 (1st Am. ed. 1836) (footnotes omitted). Equity required only that the information sought be "reasonably material" to the case at issue. W. Kerr, *A Treatise on the Law of Discovery* 163 (1870). Where information "may be directly or indirectly material for arriving at a decision, the discovery is material and must be given," and, therefore, "[a] certain latitude must, therefore, always be allowed." *Id.* at 161, 162.

Protective orders evolved as a means for limiting the scope of discovery. They were not employed for the purpose of limiting dissemination, publication, or use of the information so obtained. If information was material or relevant to a civil action, it was properly discoverable and, therefore, became part of the public records. Justice Story was emphatic that, although discovery bills should not include "scandalous and impertinent matter," any exercise of judicial authority to "expunge"<sup>15</sup> such materials was carefully circumscribed:

[I]n cases of mere impertinence, the court will not . . . order the matter alleged to be impertinent to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is erroneously struck out, the error is irremediable; but if it is not struck out, the court may set the matter right in point of costs.

Story, *Commentaries on Equity Pleadings* at § 267 (footnotes omitted). Any momentary embarrassment created by information in the public files was properly controlled by other, less intrusive, devices:

It was to prevent these glaring faults of scandal and impertinence, alike mischievous and oppressive,

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<sup>15</sup> Because civil discovery developed as an element of equity pleading, the motion to strike is the true ancestor of the protective order in this case. Today Wash. CR 12(f), like its federal counterpart, permits the court in limited circumstances to "order stricken from any pleading . . . any redundant, immaterial, impertinent or scandalous matter."

(which might make the records of the courts the vehicles of slander or idle gossip,) that courts of equity, at a very early period, required all bills to have the signature of counsel affixed to them; and if no such signature appears, or the signature is not genuine, the bill will be dismissed, or ordered to be taken off the files of the court. . . . *But nothing, which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous.*

*Id.* at § 269 (footnotes omitted) (emphasis added). Likewise, an answer to a bill in equity that contained relevant matter could not be deemed scandalous and, thus, could not properly be expunged by order of court. *Id.* at § 862.

Depositions, though traditionally a device for perpetuating trial testimony, were treated like other public documents.<sup>16</sup> In *United States v. Tilden*, 28 F. Cas. 169, 170 (S.D.N.Y. 1878) (No. 16,520), the defendant opposed the plaintiffs' motion to have certain depositions opened and filed, claiming that there existed "a policy that depositions *de bene esse* . . . are not intended to be published or opened, unless by consent, until the trial" in order to permit "irrelevant and scandalous matter . . . [to] be suppressed and excluded." The court, however, recognized a consistent policy of openness:

While it is possible that in some cases the power to take testimony may be abused for the purpose of

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<sup>16</sup> In its discussion the Washington Supreme Court assumed that depositions are the only discovery process covered by the Protective Order. In attempting to distinguish a Florida decision which had denied a motion to exclude the press and public from *discovery* proceedings, the court simply observed that, although under Florida law *depositions* are generally open to the public, "[t]hat is not the case in this state." (JA 118a.) The basic presumption of public access cannot be dismissed so casually. Washington's Civil Rules, like their federal counterparts, provide for several alternative and cumulative discovery methods. The state rules also provide that "[a]ll pleadings and other papers" are to be filed with the court, Wash. CR 5(d)(1), and specific rules in King County, where Rhinehart's lawsuit was filed, require that answers to interrogatories, responses to requests for production of documents, and answers to requests for admissions be filed with the court. See LR 33(a)(3), 34(b)(2), 36(a)(2), Local Rules of the Superior Court for King County (West 1983).



publishing scandalous and irrelevant matter, yet on the other hand the power of either party to forbid the opening of the depositions until the trial may lead to abuses much worse, and to surprise and failure of justice on the trial.

*Id.* at 171. The court in *Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601, 604 (2d Cir. 1922), followed this ruling, concluding that "there was not the slightest reason why the deposition should not . . . become accessible to the litigants, and for that matter to the public." *Id.* at 604.

The rarity of such orders argues persuasively that pretrial civil proceedings are presumptively matters of public interest. Even before 1925, when this Court held in *Gitlow v. New York*, 268 U.S. 652, 666-67 (1925), that the First Amendment applied to the states through the Fourteenth Amendment, state courts rarely issued such restrictive orders.<sup>17</sup> Moreover, they were issued only in certain special types of litigation, such as

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<sup>17</sup> For example, in 1893 a newspaper reporter was denied access to "the painful, and sometimes disgusting, details of a divorce case" because the court concluded that such information should not be made available merely "to gratify private spite or promote public scandal." *In re Caswell*, 18 R.I. 835, 836, 29 Atl. 259, 259 (1893). Similarly, in 1917, a defendant was denied copies of certain letters and depositions that had been sealed by consent at the conclusion of her divorce case. She had hoped to use the information to prevent the admittance of her former husband's new wife to a private club. *See King v. King*, 25 Wyo. 275, 168 Pac. 730 (1917). A series of Michigan cases held that pleadings are not really public records. *See Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896); *Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891). These rulings, however, appear to have been premised upon the notion that only the parties to a lawsuit may publish or disseminate the contents of pleadings. It appears that even the Michigan courts would not have sanctioned such an order against a party. *See Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888). According to Holmes, the judicial authority to limit dissemination of pretrial proceedings derived from English Chancery practice, which treated any publication about matters that were *sub judice* as a contempt of court. *Cowley v. Pulsifer*, 137 Mass. 392, 396 (1884). *See, e.g.*, 8 Halsbury, *The Laws of England* 9-12 (3d ed. 1954). *See generally* Goodhart, *Newspapers and Contempt of Court in English Law*, 48 Harv. L. Rev. 885, 895-906 (1935). In the 1940s, this Court held that such broad judicial authority was repugnant to the mandate of the First Amendment. *See Craig v. Harney*, 331 U.S. 367 (1947).

divorce proceedings.<sup>18</sup> Even with the development of liberalized pleading and discovery procedures, federal courts continue to recognize a similar presumption that "discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (per curiam), cert. denied sub nom. *American Tel. & Tel. Co. v. MCI Communications Corp.*, 440 U.S. 971 (1979). See also *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), cert. denied, 379 U.S. 900 (1964); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979); *Davis v. Romney*, 55 F.R.D. 337, 340 (E.D. Pa. 1972); *Essex Wire Corp. v. Eastern Elec. Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969). In 1963, even while it expressed "no doubt" about the constitutionality of a properly drawn protective order, the Second Circuit held that the First Amendment limited judicial discretion in issuing protective orders. *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963).

In 1979 the *Halkin* opinion drew upon this broad historical background, when it recognized a basic First Amendment interest in disseminating discovery materials. The court held that a protective order restraining litigants "from communicating matters of public importance for an indefinite period of time . . . constitutes direct governmental action limiting speech

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<sup>18</sup> In tolerating certain limitations on pretrial publicity of information learned in discovery, the courts in the 1920s and 1930s were apparently concerned with the excesses of tabloid journalism in reporting the details of divorce proceedings. See Ragland at 30-31, 91. The Minnesota statute that led to the seminal prior restraint decision, *Near v. Minnesota*, was enacted for almost identical reasons. One historian has described how *Near* arose out of the tabloid journalism that flourished in the 1920s and offended the legal community with "the graphic details of the tabloid's portrayals of scandals and divorces of rich or prominent people." Murphy, *Near v. Minnesota in the Context of Historical Developments*, 66 Minn. L. Rev. 95, 134 (1981). See also F. Friendly, *Minnesota Rag* (1981). As in *Near*, however, such concerns do not justify compromising well-established principles governing prior restraints and similar orders.

and must be carefully scrutinized in light of the First Amendment." *Halkin*, 598 F.2d at 183. Recognizing that a pretrial order prohibiting publication of newsworthy information posed "many of the dangers of a prior restraint," *id.* at 186, the court proposed a two-step analysis. A trial court must first establish whether a particular protective order in fact restrains expression and the nature of that restraint. Second,

[t]he court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

*Id.* at 191 (footnotes omitted). In the aftermath of *Halkin* a number of courts have recognized substantial First Amendment problems arising from the unrestrained use of pretrial protective orders.<sup>19</sup>

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<sup>19</sup> In concluding that no First Amendment standards are necessary, the Washington Supreme Court has rejected the overwhelming weight of authority. See, e.g., *Doe v. District of Columbia*, 697 F.2d 1115, 1118-21 (D.C. Cir. 1983) (reaffirming *Halkin* test); *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1982) (applying presumption of openness); *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir. 1982), cert. denied sub nom., *Attorney General of Ohio v. Krause*, 103 S. Ct. 54, 74 L. Ed. 2d 59 (1982) (applying *Halkin* test); *In re Upjohn Co. Antibiotic Cleocin Prods. Liability Litigation*, 664 F.2d 114, 118 n. 1 (6th Cir. 1981) (reserving *Halkin* issues); *San Juan Star*, 662 F.2d at 116 (adopting "heightened sensitivity" First Amendment access test); *United States v. General Motors Corp.*, No. 83-2220 (D.D.C., filed Oct. 19, 1983) (applying *Halkin*); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 475-82 (S.D.N.Y. 1982) (recognizing First Amendment interests at stake); *Zenith Radio Corp. v. Matsushita Elec. Indust. Co.*, 529 F. Supp. 866, 909 (E.D. Pa. 1981) (adopting *San Juan Star* formula); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (applying *Halkin* test); *Tavoulareas v. Piro*, 93 F.R.D. 24, 30 n.4 (D.D.C. 1981) (acknowledging flexibility in *Halkin* test); *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 425-27 (W.D.N.Y. 1981) (approving *Halkin*); *Brink v. DaLesio*, 82 F.R.D. 664, 676-78 (D. Md. 1979) (applying *Halkin*). State courts have also considered the First Amendment problems caused by routine issuance of such orders. See *Farnum v. G.D. Searle & Co.*, No. 303/68882 (Iowa, filed Oct. 19, 1983) (applying *Halkin*); *Montana Human Rights Div'n v. City of* (footnote continues)

## II.

**SPECULATIVE CONCERNS UNSUPPORTED  
BY FINDINGS ARE INSUFFICIENT TO  
JUSTIFY A CURB ON FIRST AMENDMENT RIGHTS**

**A. Generalized Interests Cannot Support a Prohibition on Free Expression.**

This Court has recognized that "the right of courts to conduct their business in an untrammelled way lies at the foundation of our system of government," and, therefore, that the judiciary must possess the authority to control "conduct [that] tends directly to prevent the discharge of their functions." *Wood v. Georgia*, 370 U.S. 375, 383 (1962). Even where the administration of justice is involved, however, the state must advance a "compelling governmental interest" to support any infringement of First Amendment freedoms and must also demonstrate that the infringement "is narrowly tailored to serve that interest." *Globe Newspaper*, 457 U.S. at 607. Invoking the generalized "interest of the judiciary in the integrity of its discovery processes" (JA 130a) does not satisfy that showing.

When a state seeks to curtail speech because it allegedly threatens the administration of justice, this Court has repeatedly held that "'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,'" *Landmark Communications*, 435 U.S. at 835 (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)), that a "'solidity of evidence' . . . is necessary to make the requisite showing of imminence," *id.* (quoting *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946)), and that "'[t]he danger must not be remote or even probable; it must immediately imperil,'" *id.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)). See also *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th

(footnote continued)

*Billings*, 649 P.2d 1283, 1290 (Mont. 1982) (applying *Halkin*); *Kuiper v. District Court*, 632 P.2d 694, 697-98 (Mont. 1981) (applying *Halkin*). But see *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982) (rejecting First Amendment test). Cf. *State ex rel. Bilder v. Township of Delavan*, 112 Wisc. 2d 539, 334 N.W.2d 252 (1983) (noting First Amendment issue but refusing closure on statutory grounds).

Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976); *Chase v. Hobson*, 435 F.2d 1059, 1061 (7th Cir. 1970). As the Court stated in *Pennekamp v. Florida*, 328 U.S. at 347, "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

In *Craig v. Harney*, 331 U.S. at 378, the Court held that the First Amendment prohibited courts from punishing news and editorial comment about pending civil litigation where the record failed to reflect a "substantial showing" that the specific publications would "create an imminent and serious threat" to the administration of justice. The Court stated:

There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

*Id.* at 374. As in this case, the government suggested that First Amendment interests are not significant where publications related merely to private civil litigation. The Court rejected this suggestion. *Id.* at 378.

The state unsuccessfully advanced generalized arguments about "the pernicious effects of public discussion" to support pretrial confidentiality in *Landmark Communications*, 435 U.S. at 840, where the Court held that a newspaper publisher could not be criminally punished for accurately reporting confidential proceedings of a state commission on judicial misconduct. As in the instant case, the state asserted that premature disclosure of any information before the commission had completed its initial fact-finding process would undermine "confidence in the judicial system," create unnecessary "adverse publicity," and hamper the "willing participation of relevant witnesses." *Id.* at 833, 835. The Court reversed, holding that neither the state's interest "in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts," was a sufficient basis for imposing criminal punishment upon expression, where the state offers "little more than assertion and conjecture to support its claim." *Id.* at 841.



Although, as the Washington Supreme Court noted (JA 125a-126a), the context of this Protective Order differs from the situation in *Landmark* because it was obtained against a litigant (albeit a reluctant one), the state's interest in promoting "confidence in the judicial system" is no stronger merely because it intrudes upon one litigant's freedom of expression at the behest of another. "Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). First Amendment freedoms are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Abstract concepts, such as the "integrity" of the judicial system, cannot by themselves support the drastic curb upon expression effected by the Protective Order.

**B. The State's Justification for Curtailing Expression Must be Articulated in Specific Findings.**

This Court's decisions dispel any notion that government may curtail freedom of expression for unexplained and speculative reasons. Rather, where vital First Amendment interests are at stake, the state must offer "an overriding interest articulated in findings" before it may constitutionally limit the First Amendment rights inherent in the open administration of justice. *Globe Newspaper*, 457 U.S. at 608 n.20 (quoting *Richmond Newspapers*, 448 U.S. at 581). Where the trial court stated merely that a failure to issue a protective order in some situations "could have a chilling effect on a party's willingness to bring his case to court" (JA 54a) and the Washington Supreme Court concluded only that "that parties generally are not eager to divulge information about their private affairs" (JA 128a), the state has not offered any findings which will support a restraint upon expression.<sup>20</sup>

<sup>20</sup> Such findings are mandated by the First Amendment because it is "of prime importance that no constitutional freedom . . . be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). As this Court has observed, "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. at 429.

The Washington Supreme Court candidly admitted that the effect of denying a protective order and permitting expression in this particular case would be merely "a matter of speculation." (JA 128a.) Such reasoning falls far short of the showing made in *Nebraska Press*, 427 U.S. at 562-63, where this Court refused to permit entry of a restraint upon publication despite the trial court's "justified" finding that a sensational murder trial "would" generate "intense and pervasive pretrial publicity" which "might impair the defendant's right to a fair trial," in part because, on the record before it, such a conclusion was "of necessity speculative." The Court stated:

Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here is not demonstrated with the degree of certainty our cases on prior restraint require.

*Id.* at 569. If the specific finding of an adverse impact of pretrial publicity upon a particular criminal defendant's Sixth Amendment rights was insufficient to justify a prior restraint in *Nebraska Press*, the wholly conjectural justification advanced in this proceeding is even less supportable.<sup>21</sup>

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), this Court was faced with a "sweeping restraint order" that prohibited communications from named plaintiffs and their counsel to prospective class members during the pendency of a class action. Avoiding the First Amendment issue, the court nonetheless held that any such order "should be based on a clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." *Id.* at 101. Furthermore, the Court stated, "the mere possibility of abuses [in class action litigation] does not

<sup>21</sup> A comparison of the instant case with *Nebraska Press* is instructive in other respects. The state sought to justify the restraint on publication in *Nebraska Press* as a means of protecting the Sixth Amendment rights of a criminal defendant. The Fifth Circuit, in *Bernard v. Gulf Oil Co.*, 619 F.2d at 474, held a similar civil order unconstitutional, noting that "[i]f exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior restraints, the interests of a civil litigant cannot do so."

justify routine adoption of a communications ban." *Id.* at 104. The Court went out of its way to comment upon the First Amendment concerns:

We conclude that the imposition of the order was an abuse of discretion. The record reveals no grounds on which the District Court could have determined that it was necessary or appropriate to impose this order. Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involved serious restraints on expression. This fact, at a minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether restraint is justified by a likelihood of serious abuses.

*Id.* at 103-04 (footnote omitted).

Nothing in the record supports a finding that the Protective Order is justified by a likelihood of serious abuses by the Seattle Times. Rather, the courts below simply embraced a *per se* rule that information which emerges in discovery should not be disseminated beyond the limited bounds absolutely necessary to prepare for trial. Before restricting or punishing expression, a court must "make inquiry into the imminence and magnitude of the danger . . . and then . . . balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications*, 435 U.S. at 843. Naked speculation about the impact of adverse publicity upon "parties generally" (JA 128a) is no substitute for the rigorous findings required by the decisions of this Court and by the First Amendment.<sup>22</sup>

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<sup>22</sup> The court below also speculated that closed proceedings may limit the possibility of perjury (JA 128a). This Court has held to the contrary, noting that public scrutiny "enhances the quality and safeguards the integrity of the factfinding process." *Globe Newspaper*, 457 U.S. at 606. See also *Cox Broadcasting*, 420 U.S. at 492 (acknowledging "the beneficial effects of public scrutiny upon the administration of justice"); 1 J. Bentham, *Rationale of Judicial Evidence* 522-23 (1827) (publicity of deposition "operates as a check upon mendacity and incorrectness").

Nor is administrative convenience a sufficient basis for curbing expression. Even in complex litigation, appropriate procedures are available to facilitate pretrial discovery while protecting the parties' First Amendment interests. *See Halkin*, 598 F.2d at 196 n.47. Moreover, Washington Civil Rule 26(c), which is identical to its federal counterpart, requires that good cause be shown prior to the issuance of any pretrial protective order. Wholly aside from the constitutional requirements, the proponent of such an order must satisfy the burden of offering "a particular and specific demonstration of fact." *Gulf Oil Co. v. Bernard*, 452 U.S. at 102 n.16. *See also General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *United States v. IBM Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975). The recognition of a constitutional floor beneath this well-established framework will not alter the structure of civil litigation.

### III.

#### **THIS COURT SHOULD APPLY A TEST THAT WILL RECOGNIZE THE FIRST AMENDMENT INTEREST IN DISSEMINATION AND THE LIMITED GOVERNMENTAL INTEREST IN PROTECTIVE ORDERS**

- A. Where a Protective Order Will Restrict First Amendment Interests, the Court Should Closely Scrutinize the Justification.**

The Washington Supreme Court sought to justify a broad restraint upon publication but failed to make the careful analysis required by the First Amendment and by prior decisions of this Court before any state may constitutionally impose such restrictions. Of course, not every protective order issued under Civil Rule 26(c) or its state and federal counterparts will trigger First Amendment concerns. Changing the time or place of a deposition or monitoring the sequence of discovery will not, for example, require that the court engage in any First Amendment analysis. On the other hand, where a defamation action is the vehicle for a direct restraint on expression, the

court should be particularly sensitive to First Amendment concerns and closely scrutinize the justifications advanced.

**B. The Court Should Carefully Examine the Harm Dissemination Will Allegedly Pose.**

A court should not issue a protective order that prohibits freedom of expression except for the most compelling of reasons. As Justice Brandeis observed in *Whitney v. California*, 274 U.S. at 377 (Brandeis, J., concurring): "Prohibition of free speech . . . is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society." The state's justification must be a "weighty one" and the order must be "necessitated by a compelling governmental interest" established on a case-by-case basis, *Globe Newspaper*, 457 U.S. at 606-07. As in *Nebraska Press*, 427 U.S. at 562 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand, J.), *aff'd*, 341 U.S. 494 (1951)), the court must determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The First Amendment requires a careful analysis of the competing interests at stake before issuance of any judicial order which restrains expression.

A court must recognize that expression has a capacity to inform and enlighten the public. To begin with any other assumption is to succumb to the undemocratic premise that "speech is an abnormally dangerous social force" that requires constant regulation. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 92 (1981). As this Court has noted in striking down state efforts to regulate and limit the exercise of commercial speech:

There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But, the choice among these alternative approaches is not ours to



make. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770. Pretrial discovery advances interests identical to those served by the First Amendment. Both are designed to promote public information, education, and knowledge. To the extent that the Washington Supreme Court perceived an inherent conflict, its conclusion is incorrect. Litigants do not, either by filing or by being drawn into a lawsuit, suddenly become wards of the state.

In examining the justification advanced to support entry of a protective order, the court should focus on the specific interests at stake in each case and then determine how each document or item of information will cause concrete harm. *See, e.g., United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981). A protective order should not be employed as a rubber stamp, conferring a judicial blessing upon the abuses of excessive discovery. Generalized assertions about potential "annoyance" or "embarrassment" do not by themselves justify any limitation upon free expression. *See NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 910-11 (1982). Furthermore, the court should be careful not to confuse constitutional rights of privacy (such as marriage or procreation) with other less significant interests stemming from tort law. Concerns about privacy that are not rooted in the Constitution should generally yield to the public interest served by the discovery process.<sup>23</sup>

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<sup>23</sup> The Washington Supreme Court's heavy reliance upon general privacy concerns stemming from tort law (JA 111a-117a) is misplaced. *See Paul v. Davis*, 424 U.S. 693, 701-13 (1976) (distinguishing privacy tort from constitutional right of privacy). The Constitution does not encompass a general right to prevent nondisclosure of private information. *J.P. v. DeSanti*, 653 F.2d 1080, 1087-91 (6th Cir. 1981). Generalized concerns for privacy are not by themselves enough to mandate the issuance of an order banning freedom of expression. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. at 909-11; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Rather than assume that protective orders are matters of routine, the court should avoid restricting expression except in the clearest instances. As Justice Holmes noted in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the expression must "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." Moreover, a mere "[f]ear of serious injury cannot alone" justify restrictions upon expression. *Whitney v. California*, 274 U.S. at 376 (Brandeis, J., concurring). Only after the court adequately weighs all the interests and concludes that the harm posed by dissemination of specific documents is so substantial and serious that the denial of such an order would immediately imperil a compelling state interest should it issue such an order. See *Landmark Communications*, 435 U.S. at 842-43. The mere possibility of abuse is not enough. *Gulf Oil Co. v. Bernard*, 452 U.S. at 104. Speculation and conjecture are equally insufficient.

**C. The Court Should Determine That The Order Will Be Effectual.**

Moreover, the court should also determine "how effectively a restraining order would operate to prevent the threatened danger." *Nebraska Press*, 427 U.S. at 562. Where the information sought to be restrained is likely to be introduced at time of trial or on summary judgment, a court should hesitate to halt publication simply to permit one litigant, for tactical reasons, to control the timing and manner of disclosure. Similarly, a protective order that forbids a party to disseminate information already contained in public records (which is the case here) not only fails to satisfy the constitutional requirements of *Cox Broadcasting* but also is ineffectual where other members of the public could have access to the same information.

**D. The Court Should Ensure That Any Restraining Order Is Narrowly Drawn And Precise.**

The state has a legitimate interest in preventing abuses of the discovery process but, as in other situations, it must pursue

its goals "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. at 438. See also *In re Primus*, 436 U.S. at 426, 438. In the context of expression, a state must always regulate with great precision.

Any limitation upon the public administration of justice must be "narrowly tailored to serve a specific, compelling governmental interest." *Globe Newspaper*, 457 U.S. at 607. Such a requirement is particularly important in these circumstances, where the Protective Order directly forbids publication. When restraints upon expression are involved, the Court has specified that the restraint "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The duration of the order must be limited and its language precise.<sup>24</sup>

#### E. The Court Should Find That There Are No Alternatives Which Intrude Less Directly On Expression.

Many problems often addressed by protective orders are easily resolved by other, less intrusive, means. In *Nebraska*

<sup>24</sup> Restrictions on information must be carefully confined to only that which is absolutely necessary to protect the interest at stake. For example, the court issued its Protective Order covering broad categories of information—such as plaintiffs' "financial affairs" (JA 65a)—without any prior review of the materials covered. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-62 (1975) (procedural safeguards required). The Washington Supreme Court also acknowledged that the Protective Order is of indefinite duration and, by its terms, applies to information revealed in open court. The court noted that such matters might be clarified on remand but offered no further guidance (JA 131a n. 9). Through its opinion, moreover, the court also implied (JA 148a-149a) that the Protective Order precludes the newspapers from publishing any information which emerges in discovery. Even where the right of non-party access was the only issue and no ban on publication was involved, the First Circuit, in *San Juan Star*, 662 F.2d at 116-17, emphasized that the protective order was narrowly drawn and of limited scope and duration.

*Press*, 427 U.S. at 562, the Court examined "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity" during a criminal case. A similar analysis should be required in the civil setting. See, e.g., *Gulf Oil Co. v. Bernard*, 452 U.S. at 104. In some cases, for example, a court may simply trust the discretion of the newspaper to publish appropriate newsworthy information. *Smith v. Daily Mail*, 443 U.S. at 105 n. 3.

Another available option is for the court to supervise and control the discovery process more closely. Because many of the dangers feared in civil litigation stem largely from a judicial reluctance to monitor the scope of discovery, many abuses addressed by protective orders could be more effectively handled through effective case management, though it may be "a dull, time consuming affair." Liman, *The Quantum of Discovery v. The Quality of Justice: More Is Less*, 4 Litigation, Fall 1977, at 8, 8. Where material that is not relevant to the lawsuit is at issue, the court can simply draft an order which limits the scope of discovery. Judicial rules permit the court to exercise broad powers of supervision over the mechanics of the discovery process; they do not create a license for broad judicial interference with expression.<sup>25</sup>

<sup>25</sup> Protective orders have served as a convenient pretrial tool. Until recent months, the federal courts had few mechanisms for curbing discovery abuse, especially where excessive discovery was the problem. Routine issuance of protective orders often reflected judicial abdication by masking, and thus facilitating, the abuses of excessive discovery. Rules 11, 16 and 26(b)(1), Fed. R. Civ. P., now grant the federal courts greater authority for effectively supervising and monitoring discovery abuse. See generally Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 Judicature 363 (1983). Increasingly, courts have come to recognize that "the judiciary's use of effective case and court management techniques can help speed the termination of civil actions without impairing the quality of justice." P. Connolly, E. Holleman & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery 3* (Federal Judicial Center 1978). Older notions that discovery was simply a matter for the attorneys, with the court serving only as a passive umpire, have now been supplanted by a judicial recognition "that the trial judge must actively supervise each stage of the case to minimize delay." *Id.* at 14. By requiring "a careful weighing of competing factors," the Court's decision in *Gulf Oil Co. v. Bernard*, 452 U.S. at 102, implicitly acknowledged that such passive case management would no longer suffice.

In most cases, injunctive remedies are not the only solution. For example, if false information is published or if an unreasonable invasion of privacy occurs, the victim will have available an action for damages. See *Restatement (Second) of Torts* §§ 623A, 652A (1977). In these ways, the law of damages operates as a check upon harmful publication of any information. A court should be reluctant to add additional, injunctive remedies when none are needed.

Furthermore, where a litigant simply fears potential trouble from third parties as a result of possible dissemination, the court can focus upon conduct by those third parties and the remedies available to curb or punish that conduct. Thus, plaintiffs' generalized fears about discrimination in employment as a result of disclosures (JA 45a) are quickly resolved by legal remedies precisely tailored for discrimination on the basis of religious belief. See 42 U.S.C. § 2000e-2 (1976) (federal antidiscrimination law); Wash. Rev. Code § 49.60.180 (1981) (state antidiscrimination law). Other measures might include restraining orders against the offending conduct (JA 85a-87a) rather than a prophylactic regulation of newsworthy discussion. See also 42 U.S.C. § 1985 (deprivations of civil rights); Wash. Rev. Code § 9A.36.080 ("malicious harassment" because of victim's religion). Finally, local police are always available to handle any threats or incidents of violence.

A protective order is a convenient device because it can promote effective case management and limit the possibility of pretrial abuses. A protective order, however, cannot eliminate every possibility of embarrassment or annoyance caused by civil litigation. It is not an all-purpose bill of peace. In many cases, therefore, a court may simply have to accept the fact that some embarrassment and annoyance may be an unavoidable consequence of free expression. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 910. In the absence of a specific showing that the harm posed by dissemination is substantial and serious, that the order would be effective and would limit publication only to the extent that it is absolutely necessary, and that there are no alternative remedies to protect the compelling state interest, the Protective Order cannot survive.



## CONCLUSION

The opinion and judgment of the Supreme Court of the State of Washington in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982), should be vacated and the cause remanded for further proceedings in accordance with this Court's opinion.

DATED November 16, 1983.

Respectfully submitted,

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## APPENDIX

### FIRST AMENDMENT:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. I.

### FOURTEENTH AMENDMENT:

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

### CIVIL RULE 26(c) of the WASHINGTON RULES FOR SUPERIOR COURT:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by

order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Wash. CR 26(c).

DEC 16 1983

ALEXANDER L. STEVAS  
CLERK

No. 82-1721

In The  
**Supreme Court of the United States**  
October Term, 1983

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THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN McCOY and KAREN McCOY,

*Petitioners,*

vs.

KEITH MILTON RHINEHART, a single person; The AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978.

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF WASHINGTON**

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**BRIEF OF THE RESPONDENTS**

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the defendants waive their right to contest the constitutional validity of the protective order by agreeing to the entry of a protective order?
2. Do the first amendment rights of religious freedom, association, privacy and access to the court system prevent the State from forcing the Aquarian Foundation to expose to public scrutiny the names of its members and donors?
3. Should a protective order be evaluated under the balancing test previously adopted by this Court to evaluate the restrictions on first amendment rights where the State has a legitimate purpose unrelated to the suppression of expression?
4. Does the good cause standard of Washington's Civil Rule 26(c) sufficiently protect any first amendment rights implicated in discovery?



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No. 82-1721

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In The  
**Supreme Court of the United States**  
October Term, 1983

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THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN McCOY and KAREN McCOY,

*Petitioners,*

vs.

KEITH MILTON RHINEHART, a single person; The AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF WASHINGTON**

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**BRIEF OF THE RESPONDENTS**

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The respondents respectfully ask this court to affirm the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on December 2, 1982.

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## STATEMENT OF THE CASE

### A. Defendant Seattle Times Published a Series of Articles Ridiculing The Aquarian Foundation, Reverend Rhinehart, and Other Members of the Foundation.

Plaintiffs the Aquarian Foundation,<sup>1</sup> its spiritual leader Reverend Keith Milton Rhinehart, and five women members of the Foundation brought this action for defamation and invasion of privacy against defendants Seattle Times, The Walla Walla Union-Bulletin and three reporters. The case comes to this court on certiorari to the Washington Supreme Court, which granted interlocutory review of discovery orders. This brief accepts as true the allegations of the sworn complaint and affidavits, which are not controverted.

The Aquarian Foundation is a Spiritualist Church founded in 1955 which holds regular weekly services in Seattle and other cities. (CP 489, 499, 516-17)<sup>2</sup> The Aquarian Foundation is a minority church; it has less than 1,000 members and many of its religious beliefs are unpopular. (JA 81a-82a)

The Aquarian Foundation, like most religions, is predominantly concerned with the promotion of moral values and ethical conduct. The beliefs of the Foundation include belief in spiritual and paranormal phenomena.

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<sup>1</sup>The Aquarian Foundation is a Washington not-for-profit corporation which has no parent company, subsidiary, or affiliate. (Sup. Ct. R. 28.1)

<sup>2</sup>This brief follows the abbreviations for the record adopted by the petitioners: "JA" (Joint Appendix); "CP" (Clerk's Papers); "SCP" (Supplemental Clerk's Papers); and "SSCP" (Second Supplemental Clerk's Papers). The Brief of the Petitioners is abbreviated as "PET BR", and the Brief of Amici Curiae as "AC BR".



The Foundation, as a Spiritualist religion, believes in survival beyond death, and the ability to communicate with deceased persons through a medium. The Foundation also believes that some persons have the ability to act as a medium for various kinds of physical phenomena, including the transfer of objects from one place or time to the present time and in the presence of the medium. Reverend Rhinehart, as the spiritual founder of the Foundation, has been its primary mental and physical medium.

The Aquarian Foundation held a religious service for approximately 800 inmates at the Washington State Penitentiary at Walla Walla in February 1978. A church choir, composed of church members, sang as part of the service. (JA 6a) The five women plaintiffs in this action were all members of the Foundation and some sang in the choir. (JA 5a) Three of the women are married, most are mothers. (*Id.*)

The religious service at Walla Walla triggered a campaign by defendants Seattle Times and Walla Walla Union-Bulletin to discredit Reverend Rhinehart, the Aquarian Foundation, and its members. Over the next 19 months, the Seattle Times published five articles ridiculing Reverend Rhinehart, the Foundation and all its members. (JA 4a)

Reverend Rhinehart and the women who had sung in the choir were humiliated when the Seattle Times falsely reported that the women had stripped off all their clothes and had wantonly danced naked exposing their genitalia before approximately 800 male prisoners. (JA 25a) The Seattle Times falsely implied that the Aquarian Foundation is a Jim Jones-like "cult", that Reverend Rhinehart

"play(s) at spiritualism," and that Reverend Rhinehart consciously defrauds his followers and supporters. (JA 7a) On another occasion, the Seattle Times falsely reported that television superhero Lou Ferrigno, the "Incredible Hulk," who represents to millions of people a symbol of good who battles against and triumphs over evil, so feared Reverend Rhinehart that he positioned his father in the audience during a sermon with a gun ready to blow Reverend Rhinehart's head off if anything happened to Lou Ferrigno. (JA 7a) The Seattle Times also falsely implied that Reverend Rhinehart's 1965 infirm conviction for private consensual adult sodomy was overturned on a mere technicality proffered by high priced attorneys during a "long and expensive legal battle." (JA 8a) The truth is that Reverend Rhinehart's erroneous conviction was vacated "on the overwhelming evidence showing that the State of Washington had knowingly used perjured testimony in order to obtain the original conviction." (CP 453)

Reverend Rhinehart, the Aquarian Foundation and the five women members filed this action seeking redress for the Seattle Times' repeated defamations.

**B. Counsel For The Seattle Times Agreed To The Entry Of A Protective Order.**

The Seattle Times immediately embarked upon an ambitious program of pretrial discovery, which Reverend Rhinehart and the Aquarian Foundation naturally assumed to have been undertaken for purposes of litigation. The Seattle Times asked Reverend Rhinehart to produce all of the following documents prepared by him within the past ten years: United States income tax returns; financial statements; all documents which evidence

gifts and donations from any source; all financial statements prepared for the Aquarian Foundation; and all documents which evidence all assets and liabilities possessed by Reverend Rhinehart. (CP 730-35) The Seattle Times also set depositions of every plaintiff. (CP 742-44)

The Seattle Times deposed Reverend Rhinehart on June 10, 1980. The deposition opened with a discussion by counsel of documents to be produced. Reverend Rhinehart objected to the production of income tax returns and asked whether information given in discovery could be published by the defendants: "Does that mean the reporters can publish all that?" (Rhinehart Dep., p. 6) Reverend Rhinehart was reluctant to turn over the documents without a court order. Counsel for defendant Seattle Times stated:

MR. SCHWAB: I am willing to agree that we can have protective orders concerning personal financial data which would make it impossible for anyone to publish that.

(Rhinehart Dep., p. 6)

Later in the deposition, the Aquarian Foundation's attorney asked, "All financial information is subject to our agreement [that it is not to be published]?" (Rhinehart Dep., p. 21) The attorney for the Times agreed, and explained to his client:

MR. SCHWAB: It is very common in lawsuits, Erik [defendant Erik Lacitis, the reporter who wrote several articles defaming the plaintiffs], to have financial information subject to protective order. It means it can be used only in the case.

We will agree financial information that we obtain through discovery in this case from you or the Foun-

dation is only to be used in this case and at trial. Our clients can see it because they are our clients. You have sued them and they work with us. I am sure we will agree that this is not to be published. We don't want the newspaper then publishing your financial affairs.

As a result of these assurances, the defendants were provided with income tax returns of Reverend Rhinehart and other financial information relating to all of the other plaintiffs. In addition, the plaintiffs produced for the defendants documents which literally filled an entire room. (CP 341)

**C. The Trial Court Ordered The Aquarian Foundation And Reverend Rhinehart To Divulge The Names Of All Persons Who Had Made Donations To Them.**

The Seattle Times next served wide-ranging interrogatories on each of the plaintiffs.<sup>3</sup> The interrogatories included a substantial number of questions relating to the financial circumstances of the parties, the names of donors to the Foundation and to the parties, specific information about each person's donations, and the names or addresses of members of the church over the last ten years. (CP 442-531)

The Aquarian Foundation and Reverend Rhinehart refused to reveal the identity of members of the Aquarian Foundation on the ground that the identity of the

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<sup>3</sup>The Seattle Times argues that discovery of financial information was supported by an affidavit showing that Reverend Rhinehart was using church contributions for his personal benefit. (PET BR 7) The affidavit speculates that a particular property "may well refer" to property owned by Reverend Rhinehart. (CP 131) This was false (CP 120) and the defendants' continued reliance on unfounded speculation is improper.

members is protected from discovery by the constitutional rights of each member to privacy, freedom of religion and freedom of association. (CP 475, 515) The Foundation also refused to list all donors, because "by revealing names and addresses of donors the defendants would have access to names of all members." (CP 512)

The trial court ordered the Aquarian Foundation and Reverend Rhinehart to identify all donors. (JA 59a-60a) The court did not immediately order the Foundation to identify all members, but instead extended to the Foundation the option of providing the information on which the plaintiffs will rely to prove a claim of diminished membership. (JA 68a-69a, 72a)

The Aquarian Foundation stated in a supplemental answer that it did not have detailed information of dates and amounts or circumstances of every gift by donor. The Foundation also objected that revealing the information they did have would violate a pledge of secrecy made to the donors, and would violate the members' rights to privacy, freedom of religion and freedom of association. (SSCP 74-76) Privacy is a fundamental tenet of the Foundation's beliefs, and compelled disclosure would violate this doctrine. (*Id.*) Rather than provide the names of members, the Foundation estimated the total number of members for each calendar quarter by dividing the total dollar amount of membership dues collected by the amount of the dues for each member. (*Id.*)

The trial court considered the supplemental answers and ordered the Aquarian Foundation and Reverend Rhinehart to identify any donors during the five years preceding the date of the complaint. (JA 59a-60a) The



trial court declined at that time to order either the Foundation or Reverend Rhinehart to directly identify all members. However, the order to reveal the names of donors and their contributions amounted to an order to reveal the membership since each member makes a membership donation and the overwhelming majority of donors are members. (CP 512)

**D. The Plaintiffs Moved For A Protective Order.**

Reverend Rhinehart and the Foundation sought a broad protective order to preserve the privacy of the members and donors of the Foundation. Reverend Rhinehart and the Foundation had learned that the Seattle Times or its counsel had been providing information to third parties for purposes of instituting lawsuits against the Foundation. (CP 127-28) Reverend Rhinehart and the Foundation were further startled to learn that the Seattle Times vehemently resisted any protective order (CP 325-34) despite its own counsel's previous agreement to enter a protective order.

The trial court initially denied the plaintiffs' request for a general protective order. The trial court relied on *In re Halkin*, 598 F.2d 176 (D. C. Cir. 1979), which required a specific factual showing which went beyond mere conclusory allegations, "to justify imposition of a protective order which would have had the effect of imposing prior restraint on the freedom of speech and of the press guaranteed by the first amendment." (JA 79a) The trial court stated that the plaintiffs could renew their motion for a protective order "in respect to specifically described discovery materials [on] a factual showing of good cause for restraining defendants in their use of those materials." (*Id.*)

After the trial court's ruling, the plaintiffs filed affidavits to prove the need to protect the names and addresses of the members of the Aquarian Foundation.<sup>4</sup> The plaintiffs had previously filed the affidavits of Keith Milton Rhinehart and of counsel stating that anonymous persons had threatened Reverend Rhinehart with violence on a number of occasions after the Seattle Times published the defamatory articles, and that the Seattle Police Department had advised Reverend Rhinehart to keep his residence a closely guarded secret. (SCP 36-39)

The additional affidavits filed by the Foundation show that the Foundation will lose members and donors if their identities are publicized, and that potential members and donors will be deterred from joining or supporting the church. An affidavit from the Secretary of the Foundation explained that publicity about the Aquarian Foundation had subjected her, her husband and five year old daughter to unbearable psychological pressure and physical danger, forcing her to resign her position. (JA 43a) Another affidavit showed that the members fear economic reprisal and harassment if the public learns of their link with the Foundation:

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<sup>4</sup>Petitioner Seattle Times erroneously states in the chronological list of relevant docket entries that the affidavits of Roberte Plante and Catherine Harold were not filed with the trial court until November 25, 1981, several months after the entry of the discovery order and the protective order. (JA 2) The trial court's docket shows that both affidavits were originally filed on April 8, 1981 and were assigned docket numbers. Indeed, the protective order recites that the trial court considered these affidavits in entering the protective order. (JA 64a) These pleadings disappeared from the court file, and duplicate copies were filed in November 1981 with the trial court's approval.

Since I have been a member of the Aquarian Foundation, Foundation members have always assumed their names and the amount of their contributions would remain confidential.

Members were also assured by Foundation representatives that their names and the amount of their contributions would remain confidential. The members desire confidentiality because they are afraid of losing their jobs, disinheritance, and other economic reprisals.

(JA 45a) The harassment and vilification had even then taken their toll, reducing the number of worshippers at the Foundation. (JA 48a)

The members' fears of reprisal and harassment were well-founded. Robert Plante, an employee of the Foundation, was the victim of a series of life-threatening incidents at the Seattle church after defendant Seattle Times and defendant Walla Walla Union-Bulletin published articles about the Foundation. These incidents so terrorized Mr. Plante that he was forced to leave Seattle. (JA 94a)

Mr. Plante witnessed a series of telephone threats, bomb threats, an assault on an elderly female member, a bombing of the church, and an assault with a shotgun. Mr. Plante explained that, "Every time [defendant] Erik Lacitis would write an article in the Seattle Times in reference to the Aquarian Foundation, more of these threats would begin to filter into the church . . . ." (JA 97a) Four other members of the Foundation filed similar affidavits. (JA 43a-50a, 83a-93a)

**E. The Trial Court Restricted The Use Of Information Learned Through Discovery Regarding Financial Affairs And Names Of Donors.**

The trial court concluded that the members' affidavits established "reasonable grounds for the issuance of a protective order."<sup>5</sup> (JA 65a) The preamble of the protective order recites that, "the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts. . . ." (JA 64a)

The protective order entered by the trial court is reprinted in its entirety at Appendix A to this brief. It is a narrowly drawn restriction on the use by the defendant of certain limited classes of information. The protective order applies only to information gained through discovery regarding "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs." (JA 65a)

The protective order was consciously drawn to preserve the defendants' right to publish anything defendants may wish to publish from a source other than court-compelled discovery:

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<sup>5</sup>Amici curiae argue that the protective order was not premised in any way upon the constitutional rights of the members and donors, pointing out that the trial court struck from the proposed order the statement that the court considered plaintiff's arguments "with respect to the rights of plaintiffs and members of the Aquarian Foundation to freedom of association and religion and to rights of privacy. . . ." (JA 64a, AC BR 19 n. 9) Amicus misreads the order. As entered, the order states that the court has read the affidavits of the members of the Foundation and has considered *all* of "the positions advanced by plaintiffs." (JA 64a) The trial court struck the specific language to emphasize that its decision was based on *all* of plaintiff's positions, and was not limited to the enumerated arguments of plaintiff which had been listed in the order.

This protective order has no application except to information gained by the defendants through the use of the discovery processes.

(JA 65a) The only limitation imposed on the defendants is that any information which they obtain solely as a result of discovery shall be used by them only for the purposes to be served by that discovery, that is, "for the discovering party to prepare and try the case." (JA 65a)

Considering the narrow scope of the protective order, the defendants and amici curiae resort to remarkable hyperbole in describing it. The order does not constitute "unprecedented injunctive relief for defamation" or "judicial assistance in enjoining a libel." (PET BR 9, 20) Nor does this order have the effect of "halting much of the newspaper commentary at the outset of the lawsuit", silencing one side of the discussion while leaving the other free to speak. (*Id.* at 13, 19; AC BR 18) The protective order does not in any way prohibit the Seattle Times from further defaming Reverend Rhinehart and the Aquarian Foundation. The Times is as free after the order to defame Reverend Rhinehart and the Foundation as it was before the entry of the order. The sole effect of the order is to prevent the Seattle Times from extracting information through the discovery process, and then using that court-compelled information for a purpose unrelated to the defense of the lawsuit.

The Seattle Times complains that, "the order contains no provision concerning its duration or its application to materials available in public records or revealed in open court." (PET BR 8) To the extent that this complaint was ever valid, the Washington Supreme Court cured any infirmity in the order by holding that Reverend Rhinehart



and the Aquarian Foundation are entitled to the protections of the court only until "the fruits of the discovery are made public through the judicial process (or by the plaintiffs or others independently of discovery). . . ." (JA 131a) The Washington Supreme Court also directed the Seattle Times to apply to the trial court for clarification that the order does not prohibit publication of discovery information later revealed in open court. (*Id.* at n.9)

**F. The Washington Supreme Court Granted Interlocutory Review And Affirmed Both The Protective Order And The Discovery Order.**

Both sides sought interlocutory review by the Washington Supreme Court, the plaintiffs of the discovery order and the defendants of the protective order. The Washington Supreme Court granted review and affirmed both orders. No further proceedings have occurred in the trial court, because the discovery order provides that no discovery should take place until the completion of the interlocutory review of the protective order. (JA 62a-63a) The only effect of the protective order to date has been to enforce judicially the stipulation by counsel for the Seattle Times to agree to a protective order.

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**SUMMARY OF ARGUMENT**

Litigants do not surrender their first amendment rights at the courthouse door. The first amendment guarantees to Reverend Rhinehart and the members and donors of the Aquarian Foundation the right to associate freely and to worship as they choose, free of government interfer-

ence. Each member and donor has the right to maintain his or her anonymity, and to support privately the beliefs and work of the Aquarian Foundation, without answering to the State or anyone else in this matter of conscience. The privacy of the members and donors of this beleaguered church must be guarded with particular care, because the church, its spiritual leaders and its members have been the targets of harassment, violence and threats. The most damaging harassment has come from the defendants, who include the Seattle Times, the major newspaper in the Seattle metropolitan area, which has a wide distribution throughout the State of Washington.

The first amendment prevents the State from tearing away the cloak of confidentiality which protects the Foundation's members and donors unless the loss of confidentiality is necessitated by the most compelling circumstances and there exists no less restrictive alternative to total disclosure. Assuming that disclosure of the identities of the members and donors of the Aquarian Foundation is necessary for discovery purposes, the impact of disclosure must be minimized by limiting dissemination of this information by prohibiting the defendants from using the information for any purpose other than preparation for and conduct of trial.

The defendants argue that they have a significant first amendment interest in publicly disseminating the identities of the members and donors of the Aquarian Foundation. Assuming such an interest exists, it must be balanced against the constitutional rights of the members and donors of the Foundation. The balance must be struck in favor of confidentiality. Dissemination of this information would result in substantial and serious injury, for it would

expose members of the Foundation to harassment and physical danger, and would deter present and future members from freely exercising their rights to associate and worship with the Aquarian Foundation. The protective order here is narrowly drawn. It extends only to confidential financial information and the identities of members and donors. Short of denying discovery, there is no alternative means of protecting the rights of the members and donors of the Foundation.

The Washington Supreme Court held that protective orders should be evaluated under the good cause standard of Washington's Civil Rule 26(c). The Seattle Times urges this Court to reject the good cause standard and hold that protective orders should be evaluated under a "close scrutiny" standard. The Court need not choose between these competing standards under the facts of this case. The members and donors of the Aquarian Foundation have a substantial first amendment interest in maintaining the confidentiality of the information sought by the Seattle Times, and the protective order should be evaluated under a balancing test. In any event, this protective order satisfies even the "close scrutiny" test proposed by the Seattle Times. It should be affirmed under any standard this Court might adopt.

Protective orders are necessary to protect the rights of all citizens to seek judicial redress for injury without fear of totally surrendering their privacy. The Court should adopt a standard for protective orders which will ensure the integrity and fairness of the judicial system, for without an effective judiciary no constitutional right is adequately protected.

**ARGUMENT****I.**

**Defendant Seattle Times Has Waived Any Rights  
To Object To The Protective Order By  
Agreeing That A Protective Order  
Should Be Entered.**

Counsel for the Seattle Times agreed during Reverend Rhinehart's deposition to the entry of a protective order restricting the use of any financial information obtained through discovery. Reverend Rhinehart produced certain financial information, secure in the knowledge that the Seattle Times had already agreed to the entry of a protective order. The Seattle Times cannot now renege on the agreement of its own counsel and challenge the propriety of the order.

A party may waive first amendment rights. *Curtis Publishing Company v. Butts*, 388 U.S. 130, 145 (1967). *Cf. Snepp v. United States*, 444 U.S. 507 (1980) (enforcing a confidentiality agreement signed by defendant as a condition of employment with the CIA). Lower courts have consistently held that a party who agrees to the entry of a protective order may not later contest the order and seek to disseminate information disclosed under the terms of the order. *Martindell v. International Tel. and Tel. Corp.*, 594 F.2d 291, 298 (2d Cir. 1979); *Nat'l Polymer Prod. Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423-24 (6th Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F.Supp. 866, 894 (E.D. Pa. 1981); *GAF Corp. v. Eastman-Kodak Co.*, 415 F.Supp. 129 (S.D.N.Y. 1976).

The defendants clearly and explicitly agreed to the entry of a protective through their counsel of record, who

is also counsel of record in this Court. Counsel explained at the time to defendant Erik Lacitis that, "It is very common in lawsuits, Erik, to have financial information subject to protective order." The defendants' present position is an anomalous about-face which would unfairly prejudice Reverend Rhinehart, the Foundation, and the members and donors. This Court should hold that the defendants have waived any right to contest the protective order.

## II.

### **The First Amendment Rights Of Religious Freedom, Association, Privacy And Access To The Court System Prevent The State From Forcing The Aquarian Foundation To Expose To Public Scrutiny The Names Of Its Members And Donors.**

#### **A. The Discovery Order Infringes Upon The Members' and Donors' Rights To Religious Freedom, Free Association, Privacy And Access To The Court System.**

Reverend Rhinehart and the Foundation have filed a companion petition for certiorari arguing that the discovery order in this case unconstitutionally infringes upon the first amendment rights of the members and donors of the Foundation. *Rhinehart, et al. v. Seattle Times, et al.*, No. 82-1758. This Court has not yet acted on that petition and we will not here argue the issues presented by that petition. However, the protective order was devised to protect the first amendment rights of Reverend Rhinehart and the members and donors of the Aquarian Foundation, and analysis of the protective order must begin with those rights.



The members of the Aquarian Foundation have a right to associate with one another to further their personal beliefs. *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958). Compelled disclosure of membership in an organization infringes upon this right of association. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960). Disclosure of the financial supporters of an organization similarly infringes upon first amendment rights of association. *Buckley v. Valeo*, 424 U.S. 1, 66 (1975).

In *Buckley v. Valeo*, this Court pointed out that disclosure can be particularly devastating to a minority or unpopular organization, and that the first amendment might prohibit disclosure entirely where such an organization could establish a real possibility of reprisal following disclosure. 424 U.S. at 71-72. More recently, the Court held in *Brown v. Socialist Workers Party*, 103 S.Ct. 416 (1982), that the state could not compel disclosure of the names of contributors to a minority party which had shown "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." 103 S.Ct. at 420-21 (quoting from *Buckley v. Valeo*, 424 U.S. at 74).

The record in this case is replete with evidence that the Aquarian Foundation is a minority religion with beliefs scorned by a substantial number of people, as evidenced by the death threats and other violent incidents at the Mother Church in Seattle. Like the Socialist Workers Party, the members and donors of the Foundation are

entitled to heightened protection of their rights of free association.

Disclosure of membership and financial donors to a church also encroaches upon the first amendment right to freely exercise one's religious beliefs. *Surinach v. Pesquera de Busquets*, 604 F. 2d 73 (1st Cir. 1979); *Cf. Church of Hakeem, Inc. v. Superior Court*, 110 Cal. App. 384, 168 Cal. Rptr. 13 (1980). The infringement upon the free exercise clause is aggravated when the very act of disclosure constitutes a violation of a religious belief or practice, as in this case. (SSCP 74-76) *Scott v. Rosenberg*, 702 F. 2d 1263, 1273 (9th Cir. 1983), *petitions for cert. filed*, 52 U. S. L. W. 3314 (U. S., Sept. 1, 1983) (No. 83-373), 52 U. S. L. W. 3294 (U. S., Oct. 3, 1983) (No. 83-570).

Compelled disclosure of the members and donors of the Aquarian Foundation would violate yet another first amendment right of the members and donors, their first amendment right to privacy, the right to be let alone. *Griswold v. Connecticut*, 381 U. S. 479 (1965). The members and donors of the Foundation have a constitutional right to maintain their anonymity, silently to support the beliefs they hold most precious. *Brown v. Socialist Workers*, 103 S. Ct. at 420; *NAACP v. Alabama*, 357 U. S. at 463. *See also Talley v. California*, 362 U. S. 60 (1959). The Washington Supreme Court in this case recognized the importance of the members' and donors' rights to privacy and stressed the need to protect a litigant's privacy against unnecessary abuse through the discovery process. (JA 116a-117a)

Reverend Rhinehart and the Aquarian Foundation also have the fundamental right to bring their grievances

before the courts of the State of Washington for peaceful adjudication. See *In re Primus*, 436 U. S. 412 (1978); *NAACP v. Button*, 371 U. S. 415 (1963). Compelled discovery of the identities of members and donors in the Aquarian Foundation would burden this fundamental right of access to the courts by requiring Reverend Rhinehart either to compromise rights of association, privacy and religion, or to abandon any hope for judicial redress of the indignities inflicted on him and his congregation by the Seattle Times. Reverend Rhinehart and the Aquarian Foundation should not be forced to abandon this action entirely in order to protect the members and donors.

**B. The First Amendment Requires The State To Minimize The Violation Of The First Amendment Rights Of The Members And Donors By Strictly Limiting The Dissemination Of The Discovered Information.**

The State of Washington has infringed the first amendment rights of Reverend Rhinehart, the Aquarian Foundation and the members and donors by ordering disclosure of the identities of the members and donors. Assuming that the discovery order is valid, the State must still minimize its infringement upon these rights. The State's infringement must be narrowly tailored to the State's purposes in ordering disclosure. The first amendment requires that the State limit dissemination of the discovered information to counsel and the parties by entering the protective order.

Any infringement upon first amendment freedoms must be narrowly tailored to achieve governmental objectives, in order to minimize the State impact on fundamental personal liberties. *Larson v. Valente*, 456 U. S.

228 (1982); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Britt v. Superior Court*, 20 Cal. 3d 844, 143 Cal. Rptr. 695, 702 (1978). The Washington Supreme Court recognized this important principle in this case. The court pointed out that discovery orders require a party "to give information about himself which he would otherwise have no obligation to disclose." (JA 110a) The Washington court recognized that the discovery order encroaches upon first amendment rights of these plaintiffs, and that the court should make every effort to protect these rights insofar as possible. (JA 112a-113a)

Scrupulous protection of the first amendment rights of the members and donors of the Foundation is particularly important in light of the unpopularity of the Foundation and its beliefs. The beliefs of the Aquarians may be neither popular nor widely accepted, but, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit first amendment protection." *Thomas v. Review Board*, 450 U.S. 707, 714 (1981). Indeed, our courts have protected most scrupulously the first amendment rights of unpopular groups. See Note, *The Constitutional Right To Anonymity: Free Speech, Disclosure and the Devil*, 70 Yale L. J. 1084, 1108-09 (1961) ("[I]t is the rebel and the heretic for whom, to a large degree, the first amendment protections were forged."). Although the Seattle Times and similar publications have chosen to attack the Aquarian Foundation, the State cannot be a party to the Seattle Times' efforts to quench the small flame of faith guarded by Reverend Rhinehart and the Aquarian Foundation. The State must minimize the impact of disclosure of the names of members and donors through the protective order.

## III.

**The First Amendment Rights Of The Aquarian  
Foundation's Members And Donors Must Be  
Balanced Against And Accommodated With  
The First Amendment Rights of the  
Seattle Times.**

**A. Freedom Of Speech And Press Cannot Be Preferred  
Over Any Other First Amendment Freedom.**

First amendment freedoms are at stake on both sides of this case. The discovery order infringes upon the first amendment rights of Reverend Rhinehart, the Aquarian Foundation and the members and donors, but the protective order also implicates the first amendment interests of the defendants. Neither side has absolute first amendment freedoms, and the State cannot prefer the first amendment rights of either party to those of the other. An accommodation of the rights of all parties must emerge from this collision of first amendment rights. The arguments of defendants and amici curiae are fatally flawed by their failure even to consider the first amendment interests of Reverend Rhinehart, the Aquarian Foundation and the members and donors.

Important though it may be in our democratic society, freedom of the press is not the queen of the Bill of Rights. Indeed, freedom of the press should be regarded as the handmaiden of our other liberties, a mechanism to prevent the state from trammeling the free exercise of religion, of assembly, or redress of grievances. Reverend Rhinehart and The Aquarian Foundation believe that this Court should rank freedom of religion superior to freedom of speech and freedom of the press.

This Court has refused in the past to establish a hierarchy among first amendment freedoms. This Court un-



equivocally declined the invitation of the Nebraska Press Association to rewrite the Constitution by ranking one fundamental constitutional right superior to another:

In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.

*Nebraska Press Association v. Stuart*, 427 U.S. 539, 561 (1976). See also *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 578 (1980) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental," quoting *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937)).

The rights of the members and donors of the Aquarian Foundation to religious freedom, free association, privacy and access to the court system stand on an equal plane with the rights of the Seattle Times to freedom of the press and free speech. The court may avoid any collision between these rights by denying discovery altogether, as urged in the Aquarian Foundation's cross-petition. However, if the court orders disclosure, the rights of the members and donors collide with the rights of the Seattle Times. The resolution of this collision must accommodate the rights of both parties, for neither side's rights are superior.

The arguments advanced by defendants and amici curiae are constitutionally deficient, for they totally ignore the first amendment rights of the members and donors of the Foundation.<sup>6</sup> The defendants would have this Court begin and end its analysis with their first amendment rights. The defendants point this Court to the wrong starting mark. Analysis must begin by considering the first amendment interests at stake on both sides of the case.

Nowhere is the bias of defendants and amici curiae more evident than in the statement of amicus American Civil Liberties Union that its interest in this case is the promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States: "Foremost among these liberties is freedom of speech protected by the first and fourteenth amendments." (Motion for Leave to File Brief of Amicus Curiae 2). Amicus ACLU is fundamentally wrong, for free speech and free press are in no way superior to our other rights. Indeed,

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<sup>6</sup>Petitioners mention the members' and donors' constitutional rights only insofar as they denigrate the members' and donors' privacy interests. (PET BR 41 and n. 23) Amici Curiae question whether public disclosure would violate any right of the members and donors. (AC BR 18-19) Both petitioners and amici ignore the uncontroverted evidence that members of the Aquarian Foundation justifiably fear publicity of their link with this oft-criticized and harassed church. Amici curiae glibly assert that nothing in the record supports the conclusion that the Aquarian Foundation "will be inhibited in aggressively litigating their claims here or, more generally, from using the courts to pursue their lawful remedies" (*Id.*), ignoring the fact that the trial court has placed Reverend Rhinehart and the Foundation in the untenable dilemma of compromising the physical safety and religious beliefs of the members and donors of the Foundation or else abandoning all hope of obtaining justice through the court system.

free speech and free press are in a very real sense not ends in themselves, but "means indispensable to the discovery and spread of political truth", *Whitney v. California*, 274 U. S. 357, 375 (1927), mechanisms to preserve a free society and to enhance other freedoms such as freedom to worship. See Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add To Freedom Of Speech?*, 26 Hastings L. J. 639, 653-54 (1975). Amicus curiae American Society of Newspaper Editors made a similar point when it defended public access to judicial proceedings by arguing that public access is important in order to monitor the functioning of the political system. *Report of the Press-Bar Committee, American Society of Newspaper Editors*, 18 (1964-65), quoted in Hudon, *Freedom Of The Press Versus Fair Trial: The Remedy Lies With The Courts*, 1 Val. U.L. Rev. 8, 11 (1966). But whether freedom of speech and freedom of press are means to an end or ends in themselves, surely it perverts the Bill of Rights to sacrifice freedom of religion, association and privacy to preserve inviolate freedom of the press.

**B. Where First Amendment Rights Collide, The Court Must Balance The Competing Interests And Accommodate The Rights Of All Parties.**

The State of Washington has caused a collision between the members' and donors' first amendment rights to freedom of religion, freedom of association and privacy, and the first amendment rights of the Seattle Times and the other defendants to freedom of the press and freedom of speech. The rights of all parties should be mutually accommodated to minimize the impact on

the rights of each. The Court should balance the rights of all parties and fairly compromise the rights of all.

This Court has repeatedly held that first amendment rights are not absolute but must be balanced against competing interests.<sup>7</sup> *United States v. O'Brien*, 391 U.S. 367 (1968); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968). A balancing test is appropriate in weighing the constitutional rights of the members and donors of the Aquarian Foundation against the first amendment interests of the Seattle Times. See *Zenith Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 912-13 (E.D. Pa. 1981); Note, *Rule 26c Protective Orders and the First Amendment*, 80 Col. L. Rev. 1645, 1657-58 (1980); Note, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 Duke L. J. 766, 790-91 (arguing that the balancing test is particularly appropriate because the State has a legitimate objective which is unrelated to the suppression of speech, i.e., the enhancement of full discovery to promote the search for truth in the judicial process).

The factors to apply in balancing the interests for and against a protective order should be drawn from this Court's prior restraint cases. The factors were marshalled in *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979):

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<sup>7</sup>In most cases, the rights of an individual collide with those of the State. In this case, the primary clash is between the rights of two private litigants, although the State has an undeniably significant interest as well in the integrity of the discovery process. (JA 130a)

The harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

Similar factors were identified in *In re San Juan Star*, 662 F.2d 108, 116 (1st Cir. 1981). Other cases have used the same factors in analyzing protective orders. *E.g.*, *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983); *Tavoulareas v. Piro*, 93 F.R.D. 24 (D.D.C. 1981); *Brink v. DaLesio*, 82 F.R.D. 664 (D. Mo. 1979); *Kuiper v. District Court*, 632 P.2d 694 (Mont. 1981). The Seattle Times urges this Court to use these factors, although, as discussed below, the Times asks the Court to subject protective orders to "close scrutiny," not evaluate them under a balancing test.

Applying the *Halkin-San Juan Star* factors to this case, the balance is clearly struck in favor of confidentiality. The threatened harm from disclosure is both clear and highly probable. Members and donors will leave the Aquarian Foundation if their link with the Foundation is publicized, and potential members and donors will be deterred from future association with the Foundation by the knowledge that the confidentiality promised by the Foundation is a Maginot Line which can be outflanked at any time by court-ordered discovery. This danger is not speculative, for it has already occurred. (JA 48a) The threats and incidents of violence directed at the Foundation amply justify the concerns of the members and donors.

The Court should also consider the interest of the State in providing a forum for the resolution of disputes



which will protect any litigant from unnecessary publicity, particularly where that publicity impinges upon fundamental constitutional rights, as both the trial court and the Washington Supreme Court recognized. (JA 54a, 128a)

The narrow scope of the protective order is also important. The order applies only to "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients or donors to any of the various plaintiffs." (JA 65a) The order does not prohibit the defendants from publishing any information about the Aquarian Foundation, but simply requires that the defendants have gleaned any published information from a source other than pre-trial discovery. (*Id.*) As interpreted by the Washington Supreme Court, the protective order is effective only "until and unless the fruits of the discovery are made public through the judicial process (or by the plaintiffs or others independently of discovery). . . ." (JA 131a) Thus, the protective order will ultimately protect only information produced during discovery not otherwise independently known by the defendants and never admitted at trial as relevant to the issues in the case. It is a gross misstatement to characterize the order as an "extraordinary burden imposed upon the defendants' constitutional rights." (AC BR 18)

No less restrictive alternative, other than denying discovery, will protect the rights of the members and donors of the Foundation. Publicizing this information will irrevocably compromise the privacy of the members and donors and will deter them and others from associating

with the Foundation. The Seattle Times suggests that a less restrictive alternative would be closer judicial supervision of the discovery process and narrower discovery. Reverend Rhinehart and the Foundation agree that narrower discovery would be appropriate in this case, but the trial court has already ordered disclosure of the information at issue here. (JA 58a)

The Seattle Times also suggests that any member or donor who feels aggrieved by disclosure of his or her association with the Foundation may seek judicial redress or police protection. (PET BR 45) This suggestion simply evidences the Seattle Times' consistent callous disregard for physical safety and psychological well-being of the members and donors of the Foundation. In any event, these proposed "less restrictive alternatives" would never serve to avoid the injuries feared, and are but pale palliatives for physical harm and relinquishment of free association and free exercise of the members' religious rights.

The Seattle Times complains that the protective order is deficient because the trial court did not enter formal findings of fact before imposing the protective order. (PET BR 36-39, AC BR 15-16) No formal findings are required.<sup>6</sup> In any event, the facts are undisputed and findings of fact would be superfluous. No one asserts that the Aquarian Foundation is a traditional mainstream

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<sup>6</sup>Petitioners rely on *Globe Newspaper Company v. Superior Court*, 457 U. S. 596, 608, n. 20 (1982), for this requirement. *Globe Newspapers* did not require formalized findings of fact, but simply called for a case by case individualized determination before denying public access to a criminal trial. *Globe Newspapers* in turn cited *Richmond Newspapers v. Virginia*, 448 U. S. 555, 581 (1980), which held that, "absent an over-

denomination, or that it is well-received by the population at large. No one questions the Molotov cocktail hurled through the window of the church, or the two men who beat an elderly female member over the head with a shovel at the entry of the church. (JA 95a-96a)

The record here clearly shows that the trial court based its decision on the individual facts of the case before it, and articulated on the record the court's reasons for its ruling. The trial court adopted the *Halkin* criteria for evaluating the propriety of a protective order. (JA 78a-79a) The court rejected the Aquarian Foundation's initial motion for a protective order, referring to the insufficiency of conclusory allegations. (JA 79a) The trial court was then presented with affidavits describing with particularity the decline in membership suffered by the Aquarian Foundation since the opening salvo in the Seattle Times' campaign against the Foundation, and the specific incidents of violence and threats directed at the Aquarian Foundation. The trial court reviewed these affidavits, "considered the positions advanced by plaintiffs," considered the importance "of access to the court", and found that, "plaintiffs have reasonable grounds for the issuance of a protective order." (JA 64a-65a) Additional findings were not necessary.

The balance must be struck in favor of confidentiality. The protective order is valid and this Court should affirm the decision below.

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riding interest articulated in findings, the trial of a criminal case must be open to the public." Neither case supports the petitioners' argument that formalistic findings of fact are necessary.

**C. The Protective Order Satisfies Even The "Close Scrutiny" Test Urged By Defendant Seattle Times.**

The Seattle Times asks this Court to subject the protective order to the "close scrutiny" test developed by the District of Columbia Circuit. *In re Halkin*, 598 F. 2d 176, 186 (D. C. Cir. 1979); (PET BR 39-45). Amici curiae echo this suggestion, calling for the "strictest scrutiny" of protective orders. (AC BR 15)

The standard suggested by the Seattle Times ignores the significant first amendment rights of the members and donors. The Court has no occasion to address the "close scrutiny" standard in order to decide this case, for the rights of the members and donors must be balanced against the rights of the Seattle Times. However, in the event that the Court wishes to go beyond the facts of this case and decide the appropriate standard to use in determining the propriety of any protective order, we show here that this protective order satisfies even the "close scrutiny" to which the Seattle Times would subject it.

Neither the Seattle Times nor amici curiae label the protective order a prior restraint, nor do they contend that the protective order suffers from the "heavy presumption against . . . constitutional validity" suffered by a prior restraint. *New York Times Company v. United States*, 403 U. S. 713, 714 (1971). Defendants' reluctance to label this protective order a prior restraint is well-founded, since the protective order does not regulate or prohibit the content of defendants' publications, but simply requires that defendants must have a source independent of state compelled disclosure for any information which

they choose to publish.<sup>9</sup> Thus, the order differs drastically from prior restraints struck down by this Court in the past. *E. g.*, *Nebraska Press Association v. Stuart*, 427 U. S. 539, 542 (1976) (order prohibiting anyone from releasing “for public dissemination in any form or manner whatsoever any testimony given or evidence adduced”); *Carroll v. Commissioners of Princess Anne*, 393 U. S. 175, 177 (1968) (order restrained petitioners from holding rallies or meetings in the county “which will tend to disturb and endanger the citizens of the county”); *New York Times Company v. United States*, 403 U. S. 713 (1971) (government sought to enjoin newspaper from publishing the contents of a classified document); *Near v. Minnesota*, 283 U. S. 697, 706 (1931) (judgment enjoining the defendants from publishing any publication “which is a malicious, scandalous or defamatory newspaper”).

Even the “close scrutiny” test proposed by defendants is satisfied under the facts of this case. The Washington Supreme Court, although it disagreed with the strict prior restraint analysis of *Nebraska Press Association*, tested this protective order under that analysis and found that it was justified. (JA 105a) The Washington Supreme Court perceived no effective alternatives other than denial of discovery altogether, and concluded that the protective order would be effective. (JA 105a) The court then looked

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<sup>9</sup>Because the protective order permits the Seattle Times to publish any information learned independent of discovery, the order does not suffer the infirmity of the West Virginia statute which prohibited a newspaper from publishing the name of any youth charged as a juvenile offender, even if the newspaper obtained the information through lawful means independent of court sources. *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97 (1979). See also *Landmark Communications Inc. v. Virginia*, 435 U. S. 829 (1978).



to the purposes for the protective order and the interests involved. The court considered the fact that protective orders "encourage full disclosure of all relevant facts so as to facilitate the administration of justice" (JA 109a), and considered the importance of the privacy rights of the members and donors of the Aquarian Foundation. (JA 110a-122a) The court balanced these interests against the "minimal" interests of the public in knowing the results of discovery (JA 128a-129a), and concluded that this protective order meets the "heavy burden" of justification. (JA 130a-131a)

The Seattle Times mischaracterizes the decision of the Washington Supreme Court as announcing "a *per se* rule that information which emerges in discovery should not be disseminated beyond the limited bounds absolutely necessary to prepare for trial." (PET BR 38) Amici curiae state with similar inaccuracy that the Washington Supreme Court has created "a presumption in favor of protective orders. . . ." (AC BR 18) The Washington Supreme Court did not create any presumption, but required a showing "that any of the harm spoken of in the rule is threatened and can be avoided without impeding the discovery process." (JA 130a) The Washington court further held that the trial court must weigh the respective interests of the parties.<sup>10</sup> (*Id.*)

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<sup>10</sup>The Seattle Times argues that it can disseminate discovery materials because it has "a substantial first amendment right to disseminate newsworthy information." (PET BR 10) Reverend Rhinehart and The Aquarian Foundation fully support the first amendment right of the Seattle Times or any other newspaper or person freely to print or to speak any facts they deem important. However, like any civilized person, Reverend

This Court should hold that the balancing test is the proper standard for evaluating a protective order when dissemination would infringe significant constitutional rights of the party against whom discovery is sought. The "close scrutiny" test fails to consider the rights of the Reverend Rhinehart and the members and donors of the Aquarian Foundation. In any event, this protective order withstands even the "close scrutiny" to which the Seattle Times would have this Court subject it.

#### IV.

#### **Any First Amendment Rights Implicated In Discovery Are Sufficiently Protected By The Good Cause Standard Of Washington's Civil Rule 26(c).**

##### **A. The Court May Condition Discovery Upon Restrictions On Dissemination Of The Information.**

The protective order in this case should be evaluated under the balancing test discussed above. This Court need not consider the broader issue of the appropriate standard for evaluating a protective order where the party against whom discovery is sought cannot show any significant countervailing first amendment interest in restricting the

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Rhinehart and the members of the Foundation value a degree of privacy, and object to exposing everything about themselves to the curious public. They look forward to the opportunity to present their case against the Seattle Times in open court, and do not fear the scrutiny of cross-examination, for the public can learn the truth through the presentation of evidence by both sides. They object, however, to surrendering to a hostile newspaper confidential information which may never become relevant, and permitting the newspaper to publish selective bits and pieces of private information in a misleading fashion.

use of discovered information. The Washington Supreme Court, however, addressed the broader issue and concluded that the interest in an effective judicial system justified the use of the good cause standard of Washington Civil Rule 26(c). (JA 130a) If the Court reaches this broader issue, Reverend Rhinehart and the Aquarian Foundation urge the Court to adopt the good cause requirement as the appropriate test of the validity of a protective order.

Any first amendment interests which the litigants have in discovery materials are adequately protected by the requirement of Washington's Civil Rule 26(c) that a court may only enter a protective order "for good cause shown . . . which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Courts have inherent power to control their own proceedings in the pursuit of justice, and have full power to prohibit a party or that party's attorney from divulging otherwise private information divulged through the court's own processes. Moreover, the interest of any litigant or attorney to disseminate information learned through discovery is minimally protected by the first amendment, if at all. A litigant gains access to discovered information only through the court's own processes, and is no worse off under a protective order than the litigant would have been had discovery been denied altogether.

This court held in *Sheppard v. Maxwell*, 384 U. S. 333, 361 (1966), that a trial court has the power to proscribe extra-judicial statements by "any lawyer, party, witness or court official" which might jeopardize the defendant's right to a fair trial. The court reaffirmed the propriety of such measures in *Nebraska Press Ass'n*, 427 U. S. at

464. Indeed, Mr. Justice Brennan, concurring in *Nebraska Press Ass'n*, referred to the fiduciary responsibility of attorneys and court personnel not to obstruct the fair administration of justice:

It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases. . . .

427 U.S. at 601 n.27. More recently, the court again suggested that the State has the power to maintain the confidentiality of certain investigative proceedings and to punish State employees or witnesses for any breach of confidence. *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 837 n.10 (1978). See also *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n.21 (1981). The Second Circuit relied on this inherent power of the court in affirming a protective order in *International Products Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (“[W]e entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another through use of the court’s processes.”)

The Washington Supreme Court recognized the power of the court to control its own proceedings in order to protect legitimate expectations of privacy and to further “the State’s vital interest in seeing that justice is administered upon all of the relevant facts, freely and truthfully disclosed by the parties.” (JA 128a)

The objection most often raised to the exercise of the court’s inherent power to control its own processes is that the State cannot condition a “benefit” (access to discoverable information) upon a waiver of constitutional rights

(first amendment right to free speech). *E.g.*, *Halkin*, 598 F.2d at 190; Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 70 (1983). This objection is misdirected in the context of pretrial discovery. The impermissible "waiver" of constitutional rights occurs only when the State demands that a citizen relinquish some preexisting constitutional right in order to receive the State provided benefit. *E.g.*, *Connick v. Myers*, 103 S. Ct. 1684 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (the State may not require teachers "to relinquish the first amendment rights they would otherwise enjoy as citizens . . ."). In these cases, the citizen received a "benefit" from the State. By contrast, when a court orders a private party to provide discovery, the State is not providing a "benefit" which belongs to the State—the court is ordering a private party to turn over private property, *i.e.*, information.

The lawsuit provides the only justification for compelling disclosure of the information. Absent the discovery order, the Aquarian Foundation has every right to refuse to disclose private information or to disclose it on whatever terms the Foundation chooses, including that the party receiving the information agree to keep the information confidential. The discovery order should not change matters. The court should be able to attach any condition to discovery which the Aquarian Foundation could have attached, so long as the basic purpose of discovery is not frustrated.

In the benefit/waiver cases, the State has no right to condition access to employment on constitutionally prohibited grounds, because the Bill of Rights precludes such



State action.<sup>11</sup> The Bill of Rights, however, does not prevent a private person from conditioning access to otherwise private information on a promise of confidentiality. The trial court here did no more than what the plaintiffs themselves had a right to do.

Court-ordered discovery also differs significantly from the benefit/waiver cases in that a litigant simply cannot disseminate confidential information known only to the adverse party until the court orders discovery. A litigant who obtains court-ordered discovery pursuant to a protective order does not "waive" or relinquish any meaningful first amendment right, because the litigant has no ability to disseminate the information unless the court orders discovery. In short, a litigant is not required to give up anything in order to obtain court ordered discovery. The litigant is undoubtedly better off with the discovery and has lost nothing by the operation of the protective order.

## **B. Civil Discovery Is Neither Presumptively Nor Historically Public.**

First amendment interests in publicizing judicial proceedings are heightened in two situations. Where judicial proceedings have been open to the public, the State must meet a heavy burden in order to restrain public dissemination of information made public in those proceedings. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Additionally, the State bears a heavy burden in denying access

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<sup>11</sup>The benefit/waiver theory might prohibit the government from seeking a protective order, since information is being sought from the government, not from a private citizen. Thus, the *Halkin* majority's reliance on the benefit/waiver analysis may have been appropriate. 598 F. 2d at 190.

to criminal trials which have traditionally been open for centuries past. *Globe Newspaper Co. v. Superior Court*, v. *Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980). This case does not implicate heightened first amendment interests because this discovery will not be conducted in public and discovery has not traditionally been a public proceeding.

The protective order was designed to protect information which has not yet even been produced. The protective order will prevent this information from becoming a matter of public record unless the information is admitted by a judge at trial. The protective order does not seal up information already made public and does not suffer from the defect which undermined the restraining order struck down in *Nebraska Press Ass'n*.

Civil discovery has never been conducted in public in the traditional manner of a criminal trial, and the principles of *Richmond Newspapers Inc.* and *Globe Newspaper Company* do not bestow on defendants any heightened first amendment interests. The "open trial" doctrine of *Richmond Newspapers Inc.* has never been extended beyond the context of criminal cases. *Globe Newspaper Co.*, 457 U.S. at 611 (O'Connor, J., concurring). Even within the context of criminal trials, pretrial proceedings have never been characterized by the same degree of openness as actual trials. *Gannett Company v. DePasquale*, 443 U.S. 368, 387 (1979).

The open trial doctrine of *Richmond Newspapers Inc.*, *Globe Newspaper Company* and *Gannett Company* simply does not apply to civil discovery. The question is not whether civil discovery has traditionally been a public or

private judicial proceeding, but whether discovery under the civil rules is a "judicial proceeding" at all. Discovery actually occurs in private largely without judicial intervention, without public notice, and most discovered materials are not even filed with the court. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. at 11-15. Chief Justice Burger summarized the situation when he observed that, "[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants." *Gannett Company*, 443 U.S. at 396 (Burger, C. J. concurring).

Broad discovery as practiced under the contemporary Rules of Civil Procedure did not exist at the common law. Pleadings played a limited discovery role both in the common law courts and at equity. Discovery through the common law pleadings was inadequate, because factual allegations came to be replaced by statements of conclusions of law and fact which were sometimes fictitious and seldom revealed much about the substance of the controversy.<sup>12</sup> G. Ragland, Jr., *Discovery Before Trial* 1-2 (1932); Comment, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 946 (1961).

The scope of discovery at the common law was extremely limited. A party could only obtain discovery as

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<sup>12</sup>The primary significance of discovery through pleadings lay in the fact that the parties were incompetent to testify as witnesses in a case in which they were interested, either for or against each other. N. Fetter, *Fetter on Equity*, 320 1895; Millar, *The Mechanism of Fact—Discovery: A Study in Comparative Civil Procedure*, 32 Ill. L. Rev. 424, 442 (1937). Thus, the pleadings were the only way to present evidence of facts known only to the opponent.

to facts material to that party's own case. Fetter, *supra*, at 321; 2 J. Story, *Commentaries on Equity Jurisprudence* 822 (13th ed. 1886); W. Kerr, *Law of Discovery* 163 (1870). No discovery was permitted regarding evidence supporting the opponent's case, or how the opponent planned to meet the case of the discovering party. R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 214 (1952).

The limited scope of discovery was firmly entrenched at the time the Constitution was adopted. The drafters of the Federal Judiciary Act of September 24, 1789, proposed to expand the scope of discovery in the federal courts to require a defendant "to disclose on oath his or her knowledge in the cause." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 95 (1923). The proposed expansion of the scope of discovery gave rise to heated debate:

It was termed a clause carrying "inquisitorial powers" . . . "extorting evidence from any person was a species of torture, and inconsistent with the spirit of freedom;" and it was finally stricken out by the Senate, on motion of Patterson.

*Id.* at 95-96.

Parties could take depositions, not for discovery, but to preserve the testimony of a witness or to obtain the testimony of a witness who might not attend trial. P. Dyer-Smith, *Federal Examinations Before Trial and Depositions Practice*, 73, 464, 527 (1939). Such depositions were clearly not public proceedings. Indeed, depositions were taken in secret on interrogatories submitted by the parties, and the parties themselves were not even permitted to

attend. Langdell, *Summary of Equity Pleading*, §§ 56, 59, 161, 171, 172 (1877), quoted in J. Wigmore, *Wigmore on Evidence* § 1846 (2d ed. 1923); R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* 36-37, 270-71 (1952). The parties themselves did not even have access to the substance of the deposition testimony until all witnesses had been examined, at which time the depositions could be published. 3 W. Blackstone, *Commentaries* \*450. Indeed, there was no assurance that a deposition would ever be published at all. 2 J. Story, *Commentaries on Equity Jurisprudence* 838 (13th ed. 1886).

The first Congress did not regard discovery as a public matter imbued with first amendment interests. The first Congress incorporated the common law tradition of sealed depositions into the Federal Judiciary Act of 1789, chapter XX, § 30, 1 Stat. 88-89. The Act was passed on September 24, 1789. The first ten amendments to the Constitution were submitted to the states by resolution passed by Congress a few days afterwards:

[I]t is hardly logical that Congress would create the right of privacy in depositions September 24, 1789 (the date of approval of the Judiciary Act by the President) and ask the states to destroy that right the next day or so.

*Times News Limited (G. Britain) v. McDonnell-Douglass Corp.*, 387 F. Supp. 189, 195 (C.D. Cal. 1974).

The traditional common law rule that depositions were not public was forcefully stated in *United States v. United Shoe Machinery*, 198 Fed. 870 (D. Mass. 1912). One of the parties sought to admit public and press to depositions. The trial court refused, distinguishing between judicial proceedings and depositions. In response to the holding



of *United Shoe Machinery*, the attorney general asked Congress to change the common law rule by enacting the proposed Publicity in Taking Evidence Act of 1913, 15 U. S. C. § 30 (1973), providing that depositions in anti-trust suits brought by the United States "shall be open to the public as freely as are trial in open court." Marcus, *supra*, 69 Cornell L. Rev. at 38-39. The sponsor of the bill acknowledged that the trial court had correctly decided *United Shoe Machinery*, but argued that the law should be changed to enhance the enforcement of the Sherman Act. 49 Cong. Rec. 4621-22 (1913).

Washington adheres to the traditional common law practice that depositions are not matters of public record.<sup>13</sup> (JA 118a) Discovery in Washington is neither public nor imbued with first amendment interests. The good cause standard of Washington's Civil Rule 26(c) adequately safeguards any minimal first amendment interests in discovery.

**C. The Good Cause Standard Will Preserve Access To The Courts, Without Which Any Constitutional Right Is A Hollow Shell.**

Any heightened standard for protective orders will chill potential litigants from exercising their right of access to the court system. The price of seeking redress in the courts should not be the unrestricted dissemination of

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<sup>13</sup>Amici curiae argue that the State of Washington would interpret its discovery rules consistent with the federal rules, which amici assert to have been interpreted to hold that discovery is open to the public. (AC BR 6-7) Whatever the rule may be in federal courts, the Washington Supreme Court stated in this case that depositions are not public in this State. (JA 118a) The Washington Supreme Court has interpreted its own court rule, and this Court has no further occasion to construe Washington's rule in light of the similar federal rule.

private information about the claimant obtained through court-compelled discovery. A defendant who is forced into litigation should not be required to choose between abandoning defense of the claim or relinquishing any right to privacy in discoverable information. The good cause standard adopted by the Washington Supreme Court preserves free access to the courts. No constitutional right is safe without effective access to the courts, which, under our system of government, are the ultimate interpreters and guardians of these rights. *Marbury v. Madison*, 1 Cranch 137 (1803).

The ultimate resolution of the constitutionality of protective orders must turn in the final analysis upon a pragmatic assessment of the functioning of the judicial system, rather than upon resort to historical analysis or the mechanical application of first amendment phrases or formula devised to meet problems altogether different from the issues presented here. First amendment analysis does not proceed by talismanic tests but through "a pragmatic assessment of its operation in the particular circumstances." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 442 (1957) (quoting P. Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 539). Discovery simply cannot function without protective orders. While commentators may disagree on the proper scope of discovery, discovery of relevant information is necessary for an effective judicial system. *Herbert v. Lando*, 441 U.S. 153, 179 (1979); *Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947). And without an effectively functioning judiciary, no constitutional right is safe, neither free speech, free press, free exercise of religion, privacy, association nor access to the courts. This bedrock reality demands that

courts be permitted to enter protective orders on a showing of good cause, without any presumption against their use and without the burden of the "close scrutiny" or "strict scrutiny" urged by defendants and amici curiae.

This is not a "newspaper" case dealing with the rights of the press to attend and report on judicial proceedings. The Seattle Times is an ordinary litigant here, and has no greater first amendment rights in resisting this protective order than would any other litigant. The Seattle Times has no monopoly on the first amendment nor any rights to obtain and disseminate information superior to that of the general public. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781-82 (1978) and 435 U.S. 795-802 (Burger, C. J., concurring); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *Saxbe v. Washington Post Company*, 417 U.S. 843, 850 (1974).

Attorneys and judges deal with the discovery process every day, and tend to forget that litigants are often justifiably shocked and humiliated when they are forced to reveal the most intimate aspects of their lives and to lay bare their most closely guarded secrets in return for the privilege of settling disputes within the court system. Cf. Rifkind, *Are We Asking Too Much of Our Courts?* 70 F.R.D. 96, 107 ("A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.") Intrusive discovery can be a powerful club to force a litigant into an unfavorable settlement, or even to relinquish just claims. Such intrusive discovery can be all the more abusive where, as here, the plaintiffs' claims are based upon an invasion of privacy

and false or misleading publications.<sup>14</sup> Both the trial court and the Washington Supreme Court recognized that potential litigants would be deterred from using the courts if the confidentiality of private information could not be guarded by protective orders. (JA 54a, 128a)

The most critical function of free speech in our society is to ensure the effective functioning of a free society. That great purpose must not be frustrated by constructing a first amendment doctrine which undermines the judicial system and frustrates the ends of justice:

The ultimate public concern is not the satisfaction of curiosity or an abstract "right to know". Rather it is the assurance that trials are in fact fair and according to law.

As the discourse on how best to reconcile these great constitutional rights continues, it is well to remember that it is only by assuring that justice is done to individuals from day to day that we can assure that all of our freedoms, including free press, are preserved through the years to come.

Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534, 538 (1965).

The good cause standard adequately protects any limited first amendment interest in discovery materials. Any more stringent standard, such as the defendants' proposed "close scrutiny" test, would unnecessarily burden a litigant's access to the courts to no apparent advantage. This Court should adhere to the good cause standard adopted by the Washington Supreme Court.

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<sup>14</sup>Even Jeremy Bentham, otherwise a vigorous proponent of publicity, J. Bentham, *Bentham's Judicial Evidence*, 67 et seq. (1825), came to recognize the propriety of confidential pretrial discovery for purposes of protecting privacy and reputation. J. Bentham, *Bentham's Rationale of Judicial Evidence*, 550, 553-54 (1827).

### CONCLUSION

The discovery ordered here infringes Reverend Rhinehart's and the Aquarian Foundation members' and donors' first amendment rights to freedom of association, religion, privacy, and access to the courts. The first amendment requires the court to minimize this impact through a protective order prohibiting public dissemination of this confidential information. The protective order should be evaluated by balancing the rights of Reverend Rhinehart and the members and donors of the Aquarian Foundation against the limited interest of the Seattle Times in publicizing the information. This Court need not address the broader issue of the proper standard to use in evaluating a protective order where the party providing discovery does not assert any constitutional right to preserve the confidentiality of the discovered information. If the Court chooses to decide the broader issue, the Court should adhere to the good cause standard adopted by the Washington Supreme Court.

For these reasons, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted

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December 16, 1983



**APPENDIX A**

**SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY**

---

No. 80-2-02460-4

---

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978.

*Plaintiffs,*

v.

THE SEATTLE TIMES, a Delaware Corporation, d/b/a The Seattle Times; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITUS AND JANE DOE LACITIS; JOHN WILSON AND REBECCA KAREN WILSON; JOHN MCCOY AND KAREN MCCOY,

*Defendants.*

**PROTECTIVE ORDER**

THIS MATTER having come on upon the motion of the plaintiffs for a protective order, and the court having reviewed the affidavits of Marilon McIntyre, Linda Dunn, Robert Plante, Gillene Avalos, and Catherine Harold, and the court having considered the positions advanced by plaintiffs \* \* \* and the court having considered that the absence of protective orders would have a chilling effect on a person's willingness to bring a case to court and that this would have the effect of denying persons access to the courts, and the court being fully advised, NOW, THERE-

FORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiffs have reasonable grounds for the issuance of a protective order.
2. Plaintiffs' motion for a protective order is granted with respect to information gained by the defendants through the use of all of the discovery processes regarding the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients, or donors to any of the various plaintiffs.
3. The defendants and each of them shall make no use of and shall not disseminate the information defined in paragraph 2 which is gained through discovery, other than such use as is necessary in order for the discovering party to prepare and try the case. As a result, information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination. This protective order has no application except to information gained by the defendants through the use of the discovery processes.
4. Defendants' motion for a stay is denied.

June 26, 1981.

/s/ JACK P. SCHOLFIELD, Judge  
Jack P. Scholfield, Judge  
King County Superior Court

Presented by:

EDWARDS AND BARBIERI

By /s/ MALCOLM L. EDWARDS  
Malcolm L. Edwards  
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No. 82-1721

Office - Supreme Court, U.S.  
**FILED**  
**FEB 2 1984**

IN THE  
**Supreme Court of the United States**

ALEXANDER L. STEVAS.  
CLERK

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a Delaware corporation,  
d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-  
BULLETIN, INC.; ERIK LACITIS AND JANE DOE LACITIS;  
JOHN WILSON and REBECCA WILSON; JOHN MCCOY  
and KAREN MCCOY,

*Petitioners,*

v.

KEITH MILTON RHINEHART, a single person; the AQUAR-  
IAN FOUNDATION, a Washington not-for-profit corpora-  
tion; KATHI BAILEY, a married person, LILLIAN YOUNG,  
a married person, TONI STRAUCH, a married person,  
SYLVIA CORWIN, and ILSE TAYLOR, representing women  
who were members of the Aquarian Foundation on or  
after March 17, 1978,

*Respondents.*

On Writ of Certiorari to the  
Supreme Court of the State of Washington

**REPLY BRIEF FOR THE PETITIONERS**

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February 2, 1984

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 82-1721

---

THE SEATTLE TIMES COMPANY, *et al.*,  
*Petitioners,*

v.

KEITH MILTON RHINEHART, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the  
Supreme Court of the State of Washington

---

**REPLY BRIEF FOR THE PETITIONERS**

---

**SUMMARY OF ARGUMENT**

Respondents are unable to justify the Protective Order on the grounds which the Washington courts adopted. Instead, they have tried to revive a waiver theory which they had abandoned in the trial court and which the state courts consistently rejected as a matter of state law. The record does not support respondents' contention that this order arose by stipulation of the parties.<sup>1</sup>

---

<sup>1</sup> The Brief for the Petitioners is abbreviated as "Pet. Br." and the Brief of the Respondents as "Resp. Br." The format for citations to the record in this Brief follows that heretofore adopted by the parties. *See* Pet. Br. 2 n.1; Resp. Br. 2 n.2. In addition, petitioners respectfully call the Court's attention to their Petition for a Writ of Certiorari, at 3 n.1 (filed April 22, 1983), for the disclosure required by Sup. Ct. R. 28.1. Blethen Corp., a privately-held corporation, owns 50.5 percent of the common voting stock of the Seattle Times Co. and Ridder Publications, Inc., which is an affiliate of Knight-Ridder Newspapers, Inc., a publicly-held corporations, owns the remaining 49.5 percent. Walla Walla Union-Bulletin, Inc., is a wholly-owned subsidiary of Times Communications Co., which is wholly-owned by the Seattle Times Co.

The other arguments respondents offer are grounded in claims that their constitutional rights of religion, association, and privacy were violated. These claims were not the basis for the order. The issue before this Court is whether the conjectural grounds which the Washington courts adopted, without findings, are constitutionally adequate to support the issuance of the Protective Order.

Although they do not dispute the First Amendment test which petitioners have proposed, respondents argue that this Court need not inquire too closely into the reasons which the Washington courts advance to justify the ban on publication. Respondents' suggestion that findings are not required or that a court need not closely scrutinize justifications in support of restrictions upon expression finds no support in the governing case law.

The order directly restricts expression and chills the exercise of First Amendment rights. Yet it advances no compelling governmental interest. Neither the rationale the Washington courts adopted nor the various constitutional arguments suggested by respondents adequately support the order.

## ARGUMENT

### I. PETITIONERS DID NOT STIPULATE TO ENTRY OF THIS PROTECTIVE ORDER.

#### A. Respondents Abandoned Their Waiver Argument and the State Courts Did Not Adopt It.

Respondents argue (Resp. Br. 4-6, 16-17) that the Seattle Times waived its constitutional rights and stipulated to entry of the order. Although respondents highlight this as their leading argument, the record offers them no support.<sup>2</sup>

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<sup>2</sup> Respondents' position is premised exclusively upon some remarks contained in a deposition (Resp. Br. 5-6) that is not part of the record. This Court has repeatedly held that it can act only on the record of the court below. See *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157, 160 (1950); *Clark v. Pennsylvania*, 128 U.S. 395, 397 (1888); *Davis v. Packard*, 31 U.S. (6 Pet.) 41, 48-50 (1832). Moreover, the Protective Order indicates (JA 64a) that



When respondents initially presented this waiver argument in January 1981 (SSCP 125-141, CP 282-303), the trial court denied their request for a protective order (JA 78a-79a). When they sought reconsideration, they dropped the waiver argument entirely (SSCP 95-104). Respondents later renewed the argument in their briefs to the Washington Supreme Court. It was again rejected.

Respondents cannot now ask this Court to overrule Washington courts on an issue of state procedure that is exclusively within the competence of the state court. This Court cannot resurrect state law arguments that the courts below rejected. *See Michigan National Bank v. Robertson*, 372 U.S. 591, 594 (1963); *Shoener v. Pennsylvania*, 207 U.S. 188, 195 (1907). Respondents' waiver argument, which they had abandoned in the trial court and which did not form the basis for the order, is not properly before this Court.<sup>3</sup>

#### **B. The Order Does Not Purport to Enforce a "Stipulation."**

Although respondents now seek to characterize the Protective Order as the product of stipulation, the record reveals a far different sequence of events. Respondents sought a broad order "covering all information obtained through discovery which is not otherwise public." (SSCP 95.) This sweeping request bore no relationship

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the trial court neither reviewed nor relied upon the deposition in formulating the order.

<sup>3</sup> Most courts have recognized that they will infer such waivers only in "clear and compelling" circumstances. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967); *In re Halkin*, 598 F.2d 176, 189 (D.C. Cir. 1979). As the Third Circuit noted in *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 n.14 (3d Cir. 1976), waiver "will not be lightly inferred and every reasonable presumption against waiver must be indulged." Even where there is an express stipulation, the Sixth Circuit has held that any such waiver must be "narrowly construed." *Nat'l Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423-24 (6th Cir. 1981).

to the purported "stipulation." Nowhere did respondents argue that the Seattle Times had already stipulated to the entry of such an order (SSCP 88-104). Petitioners opposed entry of the order, arguing that the court must give adequate weight to First Amendment considerations (CP 212-225).

The trial court thereafter issued its memorandum opinion, ruling that any First Amendment limitation upon the scope of protective orders "could have a chilling effect on a party's willingness to bring his case to court." (JA 54a.) The Washington Supreme Court affirmed. The constitutionality of the order must be tested against those reasons. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-04 (1981) (federal court order limiting communications by litigants must be based on "clear record and specific findings" that establish "likelihood of serious abuses"). The courts did not rely upon the stipulation rationale or any of the other grounds which respondents now press.<sup>4</sup>

The purported "stipulation" in fact never reached fruition. It died on the vine of respondents' repeated refusals to cooperate with pretrial discovery. Respondents incorrectly assert that "the plaintiffs produced for the defendants documents which literally filled an entire room." (Resp. Br. 6.) The Seattle Times has not yet obtained any significant document discovery. As petitioners argued (CP 304-324, 344-364), and as the trial court determined (JA 77a-78a), respondents aborted

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<sup>4</sup> Respondents' waiver argument is deficient in other respects. The Protective Order (JA 64a-65a), by its terms, is far broader than the alleged "stipulation." It is not limited to financial information obtained from Rhinehart or the Aquarian Foundation, which respondents argue (Resp. Br. 5-6) was the substance of the so-called "stipulation." It covers not only financial information about Rhinehart and the Foundation, but also financial information relating to any of the respondents and the identity and address of any past or present Foundation members, contributors, donors, and clients.

document discovery when they refused to permit inspection and copying of Aquarian documents.

The only documents respondents produced which related to Rhinehart's or the Foundation's financial affairs, moreover, were copies of Rhinehart's tax returns which respondents, not the Seattle Times, placed in the *public files*. They were not required to deposit the discovery materials in a public file. Nevertheless, they did so, and the tax returns became public records in the trial court, the Washington Supreme Court, and now in the Clerk's office of this Court (CP 602-670). The voluntary act of placing this material in public files obviously undercuts any argument that respondents produced such financial data in reliance upon a stipulation between counsel. At this point, only petitioners are denied the right to disseminate or discuss this information, which is available to the rest of the media.

## **II. THE WASHINGTON COURTS DID NOT ISSUE THE ORDER FOR THE REASONS RESPONDENTS ADVANCE.**

### **A. The State Courts Sought to Promote and Encourage Civil Litigation.**

Respondents do not defend the rationale the Washington courts adopted. They argue instead that the trial court entered the order to protect respondents' constitutional rights of religion, association, and privacy, because they contend that any discovery into the factual basis of their claims would be unconstitutional (Resp. Br. 17-34). In making this argument, however, respondents ignore the trial court's memorandum opinion (JA 51a-54a), which clearly explained the court's reasons for entering the order. Respondents speculate (Resp. Br. 11 n.5) about the court's decision to excise from its order (JA 64a) respondents' proposed language relating to their rights of association, religion, and privacy. They also distort (Resp. Br. 21, 33) the reasoning of the Washington Supreme Court to accommodate their con-

stitutional argument and attempt to reargue (Resp. Br. 17-21) legal issues from another case now pending before this Court on a separate petition for certiorari.<sup>5</sup>

The Washington courts stated the reasons for the order. The justification for the order appears in the trial court's opinion (JA 51a-54a) and in the decision of the Washington Supreme Court upholding the order (JA 100a-149a). Both courts imposed the order to promote and encourage civil litigation because they believed that not to do so might inhibit the use of the judicial process as a forum for resolving disputes. Respondents thus completely misrepresent both the intent and the substance of the order when they assert (Resp. Br. 17) that it was "devised to protect the First Amendment rights of Reverend Rhinehart and the members and donors of the Aquarian Foundation."

#### **B. The Order Is Not Supported by Adequate Findings.**

Petitioners have argued (Pet. Br. 34-39) that a court must base such an order upon specific and detailed find-

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<sup>5</sup> Petitioners do not believe that it is appropriate to respond once again to the legal arguments (Resp. Br. 17-34) relating to whether respondents have a constitutional right to press an action for damages caused by loss of Foundation membership and public financial support while simultaneously refusing any discovery into the basis of the claim. Respondents' entire argument that the Protective Order is constitutionally mandated is premised upon the assumption that pretrial discovery in this case violates the Constitution. That issue is the subject of a separate petition for certiorari and is adequately discussed elsewhere. See generally Brief in Opposition to Cross-Petition for Writ of Certiorari, *Rhinehart v. The Seattle Times*, at 13-20 (U.S. No. 82-1758, filed May 31, 1983). Contrary to respondents' assertions (Resp. Br. 22-25), there is no "collision" of First Amendment rights because "[e]very person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based." *Caesar v. Mountanos*, 542 F.2d 1064, 1068 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977). See also *Anderson v. Nixon*, 444 F. Supp. 1195, 1199-1200 (D.D.C. 1978). Respondents are not bystanders to their lawsuit. The matters covered by the Protective Order constitute evidence directly relating to the tort claims in their complaint.

ings, while respondents contend that findings are not required because all facts were "undisputed and findings of fact would be superfluous." (Resp. Br. 29.) Respondents' argument undermines itself. The courts below, in their written opinions, expressly stated that petitioners' First Amendment rights could be overridden for the general goals of facilitating pretrial discovery and encouraging access to the courts. Neither court indicated that it was imposing the order to protect respondents' rights of religion, association, and privacy. In *Gulf Oil*, 452 U.S. at 101, this Court required federal courts to provide "a clear record and specific findings" before imposing a communications ban on litigants. Respondents' disingenuous characterization of the Protective Order on appeal makes it abundantly clear why this rule is not only prudent but necessary.<sup>6</sup>

Respondents fail to grasp that the very reason that courts are required to make findings is to frame and limit the issues that may be addressed on appeal and ensure that any intrusion upon First Amendment values is necessary and is supported by substantial findings. See *Press-Enterprise Co. v. Superior Court*, No. 82-556, slip op. at 8 (U.S. Jan. 18, 1984) (findings necessary to close criminal *voir dire* must be "specific enough that a reviewing court can determine whether the closure order was properly entered"); *Gulf Oil*, 452 U.S. at 102 ("weighing of competing factors" necessary to provide "record useful for appellate review"). Whether the Aquarians are a "traditional mainstream denomination"

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<sup>6</sup> It is difficult to see how the order, which is directed against a private party, is designed to advance respondents' constitutional rights of religion, association, or privacy. If, as respondents argue (Resp. Br. 28, 33 n.10), the order lasts only until time of trial or until dispositive motions are submitted, see *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), cert. denied sub nom., *Citytrust v. Joy*, 103 S. Ct. 1498, 75 L. Ed. 2d 930 (1983), the order has no lasting impact. Because this material will be publicized in any event, as respondents have built their case upon it, there is no constitutional justification for a temporary prior restraint.



or whether their tenets are "well-received by the population at large" (Resp. Br. 29-30) are questions that the Washington courts did not address (JA 129a) and are not now before this Court. Even if the Establishment Clause were read to permit courts to restrict free expression in order to protect self-proclaimed "minority" religions from adverse publicity, it would not reduce the need for rigorous analysis and specific findings before a court issues a pretrial order which limits the exercise of others' First Amendment rights.<sup>7</sup>

The constitutionality of the order cannot turn on whether a Molotov cocktail was once hurled through the window at Foundation headquarters or whether two men once set upon an elderly woman near the Foundation's offices (Resp. Br. 30). Respondents have not sought to enjoin these activities and the order in question is not directed against their perpetrators. The record is devoid of anything but conclusory assertions that the newspapers were in any way linked to those incidents and the trial court properly did not rely upon respondents' affidavits.<sup>8</sup>

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<sup>7</sup> Spiritualism has long been active and has enjoyed periodic bouts of popularity in America. Since 1848, spiritualists have obtained many converts and have repeatedly been exposed by critics: "Today, of course, produces its own crop of supernormalities over which debate rages as fiercely as ever, together with its new generations of debunkers. Charlatans are unmasked as regularly and unavailingly as ever they were. As with those other 'miracles', the show goes on regardless. Passions run as high as ever they did. The spirits are willing, and the flesh is weak." R. Brandon, *The Spiritualists: The Passion for the Occult in the Nineteenth and Twentieth Centuries* 254 (1983).

<sup>8</sup> The articles complained of were published in April 1973, February, March, and April 1978, and November 1979 (JA 4a). Although respondents declare that the assertions in their complaint must be accepted as true and claim that the Seattle Times has shown "consistent callous disregard for physical safety and psychological well-being" of the Aquarians (Resp. Br. 2, 29), a review of the excerpts attached to their complaint (JA 20a-29a) shows no incitement or even attempted incitement. Respondents' strident assertions of some causal link between the publications and the random

Freedom of expression may not be curtailed or punished because of "assertion and conjecture." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978). Just as the rationale that the Washington courts gave for issuing the order is nothing more than speculation that some future litigants might be deterred from resorting to the judicial process to resolve disputes, the rationale that respondents *imagine* the courts gave is equally speculative and conjectural.

### III. THE APPROPRIATE CONSTITUTIONAL TEST MUST RECOGNIZE PETITIONERS' FIRST AMENDMENT INTERESTS.

#### A. Respondents Do Not Challenge the First Amendment Test Petitioners Propose.

Respondents agree with petitioners that "[t]he factors to apply in balancing the interests for and against a protective order should be drawn from this Court's prior restraint cases." (Resp. Br. 26.) Respondents also rely upon the requirements identified in *In re Halkin*, 598 F.2d 176, 191 (D.C. Cir. 1979), and note that the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981), identified similar factors (Resp. Br. 27). Instead of challenging the constitutional test petitioners propose, respondents claim (Resp. Br. 27-34) that the

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incidents of urban violence catalogued in their affidavits (JA 40a-41a., 43a, 45a-46a, 48a, 83a, 92a, 97a-98a) are typical examples of *post hoc, ergo propter hoc* reasoning. The two incidents which respondents attempt to connect to the Seattle Times, the receipt by Marilou McIntyre in June 1979 of a 15-month old news clipping about Rhinehart (JA 49a-50a, 55a-57a) and some shouting by three men on a Seattle street in November 1980, a year after the last article had appeared in the newspaper (JA 46a-48a), hardly support respondents' contention that petitioners have sought "to quench [the Aquarians'] small flame of faith" or to attack the "Maginot Line" which Rhinehart has built around his financial sources (Resp. Br. 21, 27).

Protective Order met the *Halkin* test and that the courts below adopted the *Halkin* and *San Juan Star* criteria.<sup>9</sup>

The record does not support respondents' position. In issuing its memorandum opinion granting plaintiffs' motion for a protective order, the trial court distinguished *Halkin* (JA 53a-54a) and concluded that a ban on publication would issue when the party seeking the restriction on publication merely "has a reasonable basis for its request" or has "reasonable grounds for the issuance for such an order." (JA 52a-53a.) The court did not purport to apply the *San Juan Star* formula, which the First Circuit had not yet devised. The Washington Supreme Court expressly repudiated both the *Halkin* and the *San Juan Star* standards (JA 130a).

**B. Respondents Incorrectly Assume That Discussion of Information Learned in Pretrial Proceedings Is Presumptively Wrongful.**

Respondents assert that any information uncovered during the course of pretrial proceedings is presumptively secret (Resp. Br. 38-43), even though they purportedly accept the First Amendment test which petitioners have proposed. Therefore, they contend, the Constitution requires no balancing test, no scrutiny of the need for such

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<sup>9</sup> Rhinehart asks this Court to apply the *Halkin* standards under a balancing test (Resp. Br. 25-34), apparently implying that petitioners do not. However, both *Halkin* and *San Juan Star* have articulated tests designed to weigh the harm posed by publication with the First Amendment interests at stake. Petitioners have proposed a similar test (Pet. Br. 39-45) to accommodate their First Amendment interests with the governmental interest in protective orders. The primary dispute is whether the Court should closely scrutinize the justifications advanced. Even an order that protects a "vital constitutional guarantee" must be closely scrutinized. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 570 (1976). See also *Press-Enterprise Co. v. Superior Court*, slip op. at 8-11 (closure of *voir dire* to protect Sixth Amendment and privacy interests). Rhinehart offers no basis for this Court to break with precedent and decline to apply traditional strict scrutiny.

orders, and no presumption against their use (Resp. Br. 43-46). Respondents' position on this important policy matter is based upon a constricted view of the multiple purposes and uses of civil litigation and upon a fundamental misreading of the Judiciary Act of 1789, Chapter XX, 30, 1 Stat. 88-89, and of the Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30 (1973).<sup>10</sup>

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<sup>10</sup> Thus, respondents assert (Resp. Br. 42) that the First Congress created a "right of privacy in depositions" in the Judiciary Act of 1789 when it provided a means whereby depositions would be sealed prior to trial. They then argue that, because it was also proposed by Congress in 1789, the First Amendment cannot extend to use of information received during pretrial depositions. See *Times Newspapers Ltd. (of Great Britain) v. McDonnell Douglas Corp.*, 387 F. Supp. 189, 195 (C.D. Cal. 1974). The argument is built from several misconceptions. The fact that the Judiciary Act of 1789 permits a practice does not automatically render it constitutional. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding portions of Judiciary Act of 1789 unconstitutional). More important, the sealing of a deposition, like the alternative statutory method of hand delivery by the magistrate before whom the deposition was taken, was based upon evidentiary requirements, in order to provide authentication and to establish a chain of custody. See *Beale v. Thompson*, 12 U.S. (8 Cranch) 70 (1814); *Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601, 604-05 (2d Cir. 1922); *Shankwiker v. Reading*, 21 F. Cas. 1163 (C.C.D. Mich. 1847) (No. 12,704). Even today the law of evidence requires that public documents be under seal, see, e.g., Fed. R. Evid. 902(1), yet no one would argue that this makes them presumptively secret. Respondents apparently confuse this evidentiary function with their privacy theory.

Similarly, respondents' discussion (Resp. Br. 42-43) of the congressional response to *United States v. United Shoe Mach. Co.*, 198 F. 870 (D. Mass. 1912), completely misses the point. Congress sought to overturn a specific holding that limited public attendance at antitrust depositions. A litigant's right to publish or discuss information uncovered during civil discovery was not at issue. Although some members preferred a bill to prevent the taking of any depositions in secret, see 49 Cong. Rec. 2511 (1913) (remarks of Mr. Mann), Congress made a pragmatic decision to deal only with the case at hand because, as Representative Norris observed, "if we should come in here with a general act there would be a dozen objections, and one would be that there might be some case where

In support of their position, moreover, respondents argue that "[d]iscovery simply cannot function without protective orders" (Resp. Br. 44) and imply (Resp. Br. 35-36) that petitioners dispute any judicial authority to control pretrial confidentiality. Petitioners recognize that the government may have an interest in limiting dissemination of discovery materials, particularly information that is not relevant to the matters at issue or is not likely to become part of the case record. See *Tavoulareas v. Washington Post Co.*, No. 83-1688 (D.C. Cir. Jan. 6, 1984). Petitioners oppose respondents' position that courts should routinely exact broad First Amendment waivers as the price for defending defamation or other claims without any detailed showing by the proponent of secrecy. See *Press-Enterprise Co. v. Superior Court*, slip op. at 7 (criminal proceedings are presumptively open and closure permitted "only for cause shown that outweighs the value of openness").

This Court should reject respondents' weakened First Amendment analysis. Litigation as an instrument of conflict resolution, increasingly widespread and complex, is too central to the operation of a free society to permit the routine adoption of a communication ban that would preclude the public from learning about the litigation. Respondents' proposed rule, if widely adopted, would destroy the vital role of civil litigation in "communicating useful information to the public." *In re Primus*, 436 U.S. 412, 431 (1978).

Contrary to respondents' argument (Resp. Br. 36-38), the ability to defend oneself by means of subpoenas and other civil discovery tools is a valuable government benefit, which may not be conditioned upon waiver of constitutional rights. In *Gulf Oil*, for example, this Court did not suggest that the benefits of the class action device permitted courts to require routine waivers by class coun-

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the testimony was immoral and indecent and where the court ought to have a right to make it secret." 49 Cong. Rec. 2513 (1913).



sel of their rights to communicate with prospective class members. Moreover, just as the state's concerns for the integrity of its electoral or referendum processes do not require participants to abandon the protections of the First Amendment, *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-92 (1978), participants, even involuntary ones, in the judicial process must be entitled to similar protections.<sup>11</sup>

#### IV. THE ORDER DOES NOT SATISFY BASIC CONSTITUTIONAL REQUIREMENTS.

##### A. The Order Infringes Upon the Exercise of First Amendment Rights.

Despite respondents' assertions to the contrary (Resp. Br. 36-38), an order which limits publication, dissemination, and use of knowledge diminishes "meaningful" First Amendment rights. In the absence of a protective order or other prior restraint, the *Seattle Times* and the *Walla Walla Union-Bulletin* are free to print anything they learn from any source. With entry of the order, they are now limited in what they can print, subject to constant

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<sup>11</sup> A recent decision has declined to recognize any First Amendment interest in publicizing information obtained in pretrial discovery. *Tavoulareas v. Washington Post Co.*, slip op. at 32-40. In adopting a weakened constitutional standard, the court relied upon *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and reasoned that private parties involved in civil litigation can be treated as though they were government agents or employees with correspondingly limited rights of expression. Its conclusion, like that adopted by the Washington Supreme Court (JA 111a-113a), rests upon a flawed analogy. Private litigants do not become agents of the state when they are brought into civil litigation. When a newspaper becomes involved in covering elections, a process over which the state has extensive powers of regulation, the government cannot dictate the choice of material to go into a newspaper. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974). Nor can the newspaper's independent status be ignored or compromised simply because respondents have sued it.

governmental supervision designed to monitor the scope of their publications and the source of their information, forced to establish "to the satisfaction of the court . . . a truly independent source" (SSCP 127) for any publications about Rhinehart, and fearful of any misstep that would bring down judicial sanctions for any unwitting "use" of information which emerges in civil discovery. See *Gulf Oil*, 452 U.S. at 103 n.17 (forcing litigants and counsel "to defend their good faith, at the risk of a contempt citation," can aggravate restriction on speech); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) (dangers of restraint include indirect "suppression of speech . . . by inducing excessive caution in the speaker"). See also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

Nor can the fact that the newspapers may obtain information as a consequence of a lawsuit filed against them lead to the conclusion that their First Amendment rights are no longer "meaningful." Respondents' argument assumes that governmental control of the flow of information creates an exception to long-established First Amendment case law by permitting a court to abridge expression without any scrutiny of the justification advanced. Even where sensitive or confidential information is provided by government, the newspapers are presumptively free to publish without government intrusion. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103-04 (1979). See also *Press-Enterprise Co. v. Superior Court*, slip op. at 8-11 (names of jurors); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam) (names of juvenile offenders); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (pretrial confessions and names of victims). The growth of modern government should not lead ineluctably to the loss of constitutional protections designed to limit governmental power.<sup>12</sup>

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<sup>12</sup> Despite this Court's decisions in *Gulf Oil*, *Smith v. Daily Mail*, *Oklahoma Publishing*, and *Nebraska Press*, the court in *Tavoulareas*

By placing deliberate handicaps upon investigative reporting, the order reaches even further. It not only restricts publication or dissemination but also outlaws any "use" of information learned as a result of Rhinehart's lawsuit "other than such use as is necessary in order . . . to prepare and try the case." (JA 65a.) The order as applied requires editors or reporters who sift and weigh information about Rhinehart, even if it has been acquired from third parties, to compartmentalize their minds and ignore what they have learned as a result of litigation.

For example, petitioners have already received significant information about the personal margin account that Rhinehart maintains at Merrill Lynch, Pierce, Fenner & Smith, Inc., using funds which petitioners believe he obtained from his followers (CP 132-135). Because this information corroborates the allegedly defamatory publications, it will almost certainly emerge on a motion for summary judgment and at trial. In the meantime, however, the newspapers may not consider what they know in undertaking further articles about Rhinehart's wealth or the allegedly fraudulent financial practices that respondents have made the focus of their lawsuit. As the court recognized in *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977), the practical impact of the order is to prevent petitioners from publishing any information about respondents, regardless of the source.<sup>13</sup>

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*v. Washington Post Co.*, slip op. at 34-40, suggested that the government may safely ignore First Amendment considerations when it controls and dispenses information. Respondents echo this argument, when they argue that government can "attach any condition" to the discovery process (Resp. Br. 37). Yet if the First Amendment does not apply to the government, what remains of its purpose? "A free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith v. Daily Mail*, 443 U.S. at 104.

<sup>13</sup> Contrary to respondents' argument (Resp. Br. 45) and the position taken by the Washington courts (JA 52a, 103a), petitioners have never argued that, as newspapers, they are entitled to

### B. The Restriction Is Not Mandated by Compelling Governmental Interests.

As petitioners argued in their Brief (Pet. Br. 34-39), the speculative rationale adopted by the Washington courts is plainly insufficient to justify restrictions upon First Amendment rights. The state has an interest in facilitating pretrial discovery and in preventing discovery abuses, but that interest does not lead to the automatic conclusion that publicity is inherently evil or that it can never co-exist with the operation of pretrial discovery.

Respondents repeatedly invoke their freedom of religion, yet the state generally has "no legitimate interest" in limiting expression that might embarrass or annoy particular religious groups. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). See also *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir.), cert. denied, 439 U.S. 916 (1978). The state's duty to promote respondents' religious freedom here is even less weighty. Despite Respondents' efforts to shift responsibility, it was not "[t]he State of Washington [that] has caused a collision" (Resp. Br. 25) of constitutional rights. Respondents, not the state, sought disclosure when they filed suit, alleging that petitioners caused the loss of members and contributors, asserting claims on behalf of all women members (JA 5a-6a, 9a-10a, 13a-14a), and challenging the newspapers' criticism of Rhinehart's financial practices. Rhinehart has no constitutional right to raise and lower his "cloak of confidentiality" (Resp. Br. 14) merely to suit his tactical convenience.

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preferential rights of access to the information at issue. The Protective Order, however, restricts publication, not access. As this Court noted in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), governmental restrictions upon publication that are directed against a "publisher or editor of a newspaper . . . [incur] more serious First Amendment overtones" than they would otherwise. In preventing "use" of information lawfully acquired by a newspaper which is engaged in "using" information on a daily basis, the order reaches the heart of the editorial process. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 254-58.

Respondents' extensive discussion about their constitutional right of privacy is similarly misplaced. There is no indication that the information concerns "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education" which are protected by the constitutional right of privacy. *Paul v. Davis*, 424 U.S. 693, 713 (1976). Nor can respondents justifiably rely upon the "'right to be left alone,'" *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), while they are simultaneously seeking to build a massive damage judgment upon the restricted information. They repeatedly confuse privacy torts with constitutional privacy.

Similarly, the state's interest in protecting respondents' associational rights is minimal where respondents themselves have made the allegedly "intrusive" (Resp. Br. 45-46) associational elements the focus of their lawsuit and a primary component of their case at trial. Even as they press their action, respondents remain free to associate with whomever they please, including the Foundation membership which, presumably, supports the lawsuit filed by their organization. Moreover, there can be no chilling effect upon the associational rights of the many *former* members, contributors, clients, and donors, who have cut their ties to the Aquarians. Indeed, in limiting their expression, the order facilitates Rhinehart's efforts (CP 335) to curtail the press and to silence disaffected former members. Should the Seattle Times receive information from these individuals which they wish to make public, Rhinehart has effectively secured their silence.<sup>14</sup>

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<sup>14</sup> Respondents' argument in support of their rights of religion, association, and privacy highlights several cases, which concern the right to confidentiality of membership lists in actions by government. As shown elsewhere, these cases do not support the broad premise for which respondents rely upon them. See footnote 5, *supra*. Moreover, the order prohibits petitioners from publishing information relating to former members, who may have no objection to



### C. This Court Should Vacate the Order.

If this Court accepts respondents' invitation and tests the order against applicable First Amendment standards, it will conclude that the Protective Order does not satisfy the basic constitutional requirements articulated in this Court's prior decisions. Respondents do not explain how the order is "narrowly tailored" to serve a specific, compelling governmental need. *Press-Enterprise Co. v. Superior Court*, slip op. at 8 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Their discussion concentrates on narrow issues relating to the identity of Aquarian members or contributors but offers no precedent to support the broad ban upon discussion of respondents' "financial affairs" (JA 65a), which prevents the newspapers from discussing the allegedly deceptive acts and practices that respondents have made the focus of their lawsuit.

Other than giving the Court a rhetorical shrug that the normal processes of the law "are but pale palliatives" (Resp. Br. 29), respondents have made no showing that less restrictive measures could not mitigate any foreseeable problems that might arise from permitting freedom of expression. See *Press-Enterprise Co. v. Superior Court*, slip op. at 9; *Gulf Oil*, 452 U.S. at 104; *Nebraska Press*, 427 U.S. at 562. Respondents assert that the courts must order the newspapers not to publish any "pieces of private information" or disclose "closely guarded secrets." (Resp. Br. 33 n.10, 45.) Yet, should petitioners publish

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publicizing their experiences with the Aquarians. It also restricts petitioners' use of information about Foundation officials, who do not share the same rights of anonymity as the membership at large. Finally, the order broadly prohibits any discussion of respondents' "financial affairs" (JA 65a) derived from information which emerges during this lawsuit. None of the membership cases which respondents rely upon creates a constitutional right to maintain the secrecy of financial practices of an organization that solicits funds from the general public. See *Press-Enterprise Co. v. Superior Court*, slip op. at 11 (closure order should limit only "information that was actually sensitive and deserving of privacy protection").

information that is not newsworthy and unjustifiably give "publicity to a matter concerning the private life" of respondents and their financial backers, a damage remedy is readily available. See *Restatement (Second) of Torts* § 652D (1977). See also *id.* at § 652E. The random incidents collected in their affidavits do not lead to respondents' conclusion that they are an "oft-criticized and harassed church" (Resp. Br. 24 n.6), that the Seattle Times has demonstrated "consistent callous disregard" for their safety (Resp. Br. 29), or that their predicted martyrdom is even remotely imminent.

Finally, respondents fail to demonstrate either the harm dissemination poses or how the order effectively averts it. See *Smith v. Daily Mail*, 443 U.S. at 105; *Nebraska Press*, 427 U.S. at 562. The courts below are also silent on this issue. Respondents concede, and the Washington courts agreed, that when offered as evidence to support or contradict respondents' claims, the information covered by the order "will then be a matter of public record and available for publication." (JA 131a.) If, as respondents acknowledge, the order has no lasting impact, it cannot guarantee access to the courts unaccompanied by public scrutiny or promote constitutional rights of religion, association, or privacy.

Is there then any compelling interest that could justify a temporary ban upon publication of factual information that is almost certain to become public? If publicity *per se* is evil, as respondents imply, then proceeding to trial or summary judgment might well provoke incidents similar to those they complain of in their affidavits. Yet if the order provides no meaningful protection in this regard, it serves no purpose and should not have been entered at the expense of petitioners' First Amendment rights.

**CONCLUSION**

Petitioners do not ask that their First Amendment rights be granted primacy over other constitutional interests. Nor do they ask for an absolute right to print anything they learn about Rhinehart and his organization. They ask only that the Washington courts give their First Amendment rights substantial weight before issuing an order which prohibits them from publishing or discussing factual information which emerges during the course of litigation. Justice should be presumptively open, not secret as respondents would prefer. Petitioners respectfully request that the judgment and opinion of the Washington Supreme Court be vacated and the cause remanded for further proceedings.

Respectfully submitted,

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February 2, 1984

MOTION FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY, *Petitioners,*

—v.—

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON STATE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, NATIONAL ASSOCIATION OF BROADCASTERS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, and THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

No. 82-1721

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THE SEATTLE TIMES COMPANY, a Delaware corporation,  
d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BUL-  
LETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN  
WILSON and REBECCA WILSON; JOHN MCCOY and KAREN  
MCCOY,

*Petitioners,*

—v.—

KEITH MILTON RHINEHART, a single person; the AQUARIAN  
FOUNDATION, a Washington not-for-profit corporation;  
KATHI BAILEY, a married person, LILLIAN YOUNG, a  
married person, SYLVIA CORWIN, and ILSE TAYLOR, repre-  
senting women who were members of the Aquarian Foun-  
dation on or after March 17, 1978,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE**

The American Civil Liberties Union, The American Civil  
Liberties Union of Washington State, American Newspaper  
Publishers Association, American Society of Newspaper Edi-  
tors, Associated Press, National Association of Broadcasters,  
Radio-Television News Directors Association, The Reporters  
Committee for Freedom of the Press, and the Society of  
Professional Journalists, Sigma Delta Chi, move pursuant to  
Rule 36.3 of the Rules of the Supreme Court of the United

States for leave to file a brief *amicus curiae* in support of the Petitioners. The written consent of the Petitioners is on file with the Court. Respondents have refused to consent to the filing of this brief and thus have required the making of this motion.

Each of the organizations which have joined as amici on this brief have a special interest in the resolution of the issue on which this Court has granted a writ of certiorari. The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit membership organization of over 250,000 members dedicated to the promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States. Foremost among these liberties is freedom of speech protected by the First and Fourteenth Amendments. The ACLU of Washington State is the state chapter of the national organization which represents those interests within the State of Washington.

The American Newspaper Publishers Association is a national trade association representing approximately 14,000 newspapers, including Petitioner, Seattle Times. The member newspapers constitute 90% of the total daily and Sunday circulation and a substantial portion of the weekly newspaper circulation in the United States.

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all of the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The Radio-Television News Directors Association ("RTNDA") is a non-profit, professional organization of journalists. RTNDA includes approximately 2,000 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news

editors from the print and broadcast media devoted to the protection of the First Amendment and the freedom of information interests of the press.

The Society of Professional Journalists, Sigma Delta Chi (the "Society") is a voluntary, non-profit organization of 28,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes are to insure that the public business is conducted in public and to keep government proceedings, including court hearings, open to public inspection.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of ASNE, which was founded over fifty years ago, include the maintenance of the dignity and right of the profession, and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Associated Press is a membership non-profit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1,350 member newspapers and its 3,300 member broadcast stations throughout the United States, and to other publishers throughout the world.

Collectively, the amici represent a broad spectrum of those citizens and organizations whose interests in freedom of speech and freedom of press are acutely threatened by the decision by the Washington Supreme Court on review here. Protective orders are a key feature of civil litigation in both state and federal courts. Because members of the amici are constantly parties to such lawsuits, the resolution of the constitutional question to be decided by this Court will directly and perva-

sively affect the amici and their members. The amici, because they are particularly concerned with the national implications of the rulings at issue here, will present to the Court a broader perspective on the interaction between the Constitution and discovery rules than the parties will provide.

Respectfully submitted,

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JAMES C. GOODALE

James C. Goodale

Dated: November 17, 1983  
New York, New York

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

No. 82-1721

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THE SEATTLE TIMES COMPANY, a Delaware corporation,  
d/b/a THE SEATTLE TIMES; WALLA WALLA UNION-BUL-  
LETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN  
WILSON and REBECCA WILSON; JOHN MCCOY and KAREN  
MCCOY,

*Petitioners,*

—v.—

KEITH MILTON RHINEHART, a single person; the AQUARIAN  
FOUNDATION, a Washington not-for-profit corporation;  
KATHI BAILEY, a married person, LILLIAN YOUNG, a  
married person, SYLVIA CORWIN, and ILSE TAYLOR, repre-  
senting women who were members of the Aquarian Foun-  
dation on or after March 17, 1978,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,  
THE AMERICAN CIVIL LIBERTIES UNION OF WASH-  
INGTON STATE, AMERICAN NEWSPAPER PUB-  
LISHERS ASSOCIATION, AMERICAN SOCIETY OF  
NEWSPAPER EDITORS, THE ASSOCIATED PRESS, NA-  
TIONAL ASSOCIATION OF BROADCASTERS, RADIO-  
TELEVISION NEWS DIRECTORS ASSOCIATION, THE  
REPORTERS COMMITTEE FOR FREEDOM OF THE  
PRESS, and THE SOCIETY OF PROFESSIONAL JOUR-  
NALISTS, SIGMA DELTA CHI, AS AMICI CURIAE IN  
SUPPORT OF PETITIONERS**

## INTERESTS OF AMICI CURIAE

A motion for leave to file this brief is being presented to this Court today pursuant to Rule 36.3 of the Rules of this Court. The interests of the respective amici are set forth in the motion, which is bound with this brief as provided by Rule 33.2(b). The amici have appeared frequently in this Court and in other courts in cases presenting challenges to First Amendment liberties.

As interpreted by the Washington Supreme Court, Civil Rule 26(c) allows that state's courts to impose impermissible burdens on the press's rights under the First and Fourteenth Amendments to the United States Constitution by authorizing protective orders that restrict the right to publish upon a showing far less exacting than that demanded by the Constitution and decisions of this Court. More broadly, the rationale of the Washington Supreme Court belittles the First Amendment rights to free speech and press which trial courts should take into account when issuing protective orders. Protective orders like the one sanctioned here represent a serious interference with the ability of organizations like amici and their members to perform their vital, constitutionally protected function of providing information to the public.

## STATEMENT OF THE CASE

The Seattle Times Company, one of the defendants in this action, published several articles that discussed the finances of the Aquarian Foundation and its founder, Keith Rhinehart, two of the plaintiffs. The articles described plaintiffs' various religious beliefs and practices. In the course of discovery, defendants sought documents concerning plaintiffs' financial affairs, Foundation membership and donations to plaintiffs, all of which was "relevant upon the issues of truth and damages." *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 228, 654 P.2d 673, 675 (1982). Plaintiffs refused to produce certain of these documents and requested the court to deny



discovery or alternatively to enter an order limiting the use to which defendants could put any information obtained in discovery.

The trial court ordered the documents disclosed but entered a broad protective order expressly prohibiting defendants from publishing this information or making it available to any news media for publication or dissemination. The trial court explained that "Protective Orders are entered routinely where the party seeking the Protective Order has a reasonable basis for its request" that the information be used for no purpose other than the litigation. Joint Appendix ("JA") 52a, 65a. The court reasoned that, since "access to the courts [was] on an equal plane of importance with freedom of the press," a protective order was appropriate where its absence "*could* have a chilling effect on a party's willingness to bring his case to court." JA 54a, 64a (emphasis added). The court never substantiated any of these general observations with particular facts in the record.

The Washington Supreme Court granted discretionary review and affirmed the entry of the protective order. The majority purported to apply the three-part test for analyzing restrictions on First Amendment rights articulated in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). However, the court summarily concluded that there was no acceptable alternative to the protective order and that the protective order would be effective in preventing "unwanted publicity." The "main inquiry" for the court, therefore, was reduced to whether a sufficient interest justified the protective order. 98 Wash. 2d at 231.

The court determined that protective orders generally were authorized to protect "the individual's right of privacy and to secure willing and honest responses" to discovery requests. 98 Wash. 2d at 238. The majority, however, never identified the precise privacy interests of plaintiffs threatened by defendants' legitimate discovery requests. Again without reference to the facts before it, the court stated as a universal proposition that parties, rather than exposing themselves to unwanted publicity

if no protective order was available, would either forgo the pursuit of their just claims or be tempted to withhold information. Admitting that it was "a matter of speculation" what the actual effect would be in any given case, the majority stated that its concern was instead with "the cloud which will be cast upon the integrity of the discovery process." 98 Wash. 2d at 654.

On the other hand, the court dismissed as "minimal" the interest of the public in knowing what information was revealed in discovery proceedings. The court contended that publishing the information involved no element of advocacy or dissemination of ideas, but "only the reporting of supposed facts," a situation which the court found to lighten the burden of justifying the restraint. 98 Wash. 2d at 230, 249. Yet, even when it admitted that the information in the present proceeding could rightly be deemed "newsworthy," the majority opined that the news media had "flourished" notwithstanding restrictions sometimes imposed during discovery. In addition, the majority found that the proper functioning of pretrial proceedings was not promoted by giving defendants the right to disclose information obtained during discovery. 98 Wash. 2d at 255.

The majority therefore concluded that the interest of the judiciary in the integrity of its discovery processes was itself sufficient to meet the "heavy burden" of overcoming the presumption against prior restraints. Thus the court held that, in determining whether "good cause" was established under Civil Rule 26(c), courts needed only to determine whether the order prevented any harm identified in the rule without impeding the discovery process. 98 Wash. 2d at 256.

## SUMMARY OF ARGUMENT

Under the Washington Superior Court Civil Rules, as under the Federal Rules of Civil Procedure, courts may enter protective orders that impose restrictions on discovery. The principal purpose served by protective orders is to prevent abuse which might otherwise arise because of the liberal scope of discovery permitted under the Rules.

The "good cause" that the moving party must show to obtain a protective order requires the court to weigh that party's need for protection against the disadvantages caused by subjecting the opposing party to the requested restriction. When the order sought impinges upon a party's right of free speech or free press, the rule should require the court to take full account of the party's First Amendment interests in determining whether good cause exists for granting the application.

When a court considers a motion under Civil Rule 26(c) that would restrict another party's right to publish information gained during discovery, it should incorporate in the "good cause" standard the stringent First Amendment analysis prescribed by this Court in cases raising similar First Amendment concerns.

Courts should not impose restraints on parties' freedom of press or speech without, at a minimum, a showing that the particular circumstances demonstrate an overriding interest to be served by the protective order for which there is no alternative intruding less on First Amendment interests. Such an order should be narrowly drawn and shown to be effective in preventing the specific harm sought to be avoided. Neither the trial court nor the Washington Supreme Court applied this standard or articulated any findings to justify a conclusion that plaintiffs could meet such a standard.

## ARGUMENT

### I. DISCOVERY RULES REQUIRE THAT FIRST AMENDMENT INTERESTS BE CONSIDERED.

The decisions by the Washington courts reflect a fundamental misconception about the relationship between the discovery process and the constitutional freedoms of speech and press. Those courts presumed that there was an inherent and irreconcilable tension between the right of courts to protect the orderly process of discovery and the right of litigants to remain free of unwarranted infringements of their First Amendment rights. No such conflict exists. Rather, Civil Rule 26(c), like Rule 26(c) of the Federal Rules of Civil Procedure, should be interpreted so that First Amendment concerns are taken into account in determining whether a party has shown "good cause" for a protective order.

The Civil Rules of the Superior Court of Washington are modeled after the Federal Rules of Civil Procedure. *See generally*, 2 L. Orland, *Washington Practice: Trial Practice* § 161.1 (Supp. 1983). The Washington courts have traditionally looked to the commentary and cases relating to the federal rules when interpreting their own civil rules. *See American Discount Corp. v. Saratoga West, Inc.*, 81 Wash. 2d 34, 37, 499 P.2d 869, 874 (1972). In this action, the Washington Supreme Court expressly noted that the federal rules were the basis for Civil Rule 26(c). Furthermore, the Court looked to federal court decisions and treatises on the federal rules to explain the purposes of discovery and the role of protective orders. *See Rhinehart v. Seattle Times*, 98 Wash. 2d 226, 231-235, 654 P.2d 673, 676-679 (1982).

It is therefore clear that the Washington Supreme Court intended to interpret Civil Rule 26(c) as it believed this Court would interpret the Federal Rules of Civil Procedure. If the Washington courts erred in perceiving how this Court would construe the federal rule governing protective orders consistent with First Amendment interests, this Court may assume that

the Washington courts will also apply their identical state rule consistent with the constitutional command. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). *See also, South Dakota v. Neville*, \_\_\_\_ U.S. \_\_\_\_, 103 S. Ct. 916, 919 n.5 (1983).

Both sets of Rules have virtually identical provisions governing pretrial discovery, including the circumstances under which documents may be obtained from parties and non-party witnesses. Civil Rule 26(b) authorizes parties to discover any unprivileged material that is relevant to the claims or defenses in the pending action. If the person from whom discovery is sought fears that the discovery request will cause him annoyance, embarrassment, oppression or undue burden or expense, the Rule puts the burden on him to move for an order protecting him from such harms. The Rule further states that the court may grant a protective order only upon a showing of "good cause" by the moving party. If this burden is met, the court has wide latitude to fashion an order responsive to the competing needs of the parties.

Without a specific court order directing otherwise, the results of discovery may be used freely by the discovering party and traditionally have been open to the public. "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *See American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.), *cert. denied*, 440 U.S. 971 (1979).<sup>1</sup> Materials legitimately obtained during discovery may be used for any purpose, including dissemination to the public. *National Polymer Prods. Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D.

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<sup>1</sup> The rules of civil procedure have made pretrial discovery an important part in the trial of civil actions. In view of this Court's finding that civil actions have been presumptively open to the public, the practice of public pretrial discovery is well-founded in history and policy. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (Burger, C.J.) (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).



503, 508 (S.D.N.Y. 1955). The party seeking to limit disclosure must establish the "good cause" ordinarily required for a protective order. See 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2035 at 264-65 (1970); 4 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, § 26.75 at n.3 (1977-1978 Supp.).

A party seeking to show good cause cannot simply rely on conclusory statements of need, but must make a particularized and specific factual demonstration. See *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981); *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); 8 C. Wright & A. Miller, *supra* at 265. Cf. *Darling v. Champion Home Builders Co.*, 96 Wash. 2d 701, 638 P.2d 1249, 1250 (1982) (protective order under Rule 23(d) must be based "upon a clear record and specific findings of fact and conclusions of law"). In essence, the "good cause" standard compels the court to measure how the order avoids the specific harm identified by the moving party against any disadvantage to the party against whom the order is sought. See, e.g., *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation*, 669 F.2d 620, 623 (10th Cir. 1982); *General Dynamics Corp. v. Selb Mfg. Co.*, *supra*, 481 F.2d at 1212.

When a request for a protective order does not implicate a constitutionally protected interest, it may be appropriate for a court to enter such an order when the moving party's request is reasonable. Thus, an order may require discovery to occur at a different time or in a different manner than that set forth in the notice in order to avoid unnecessary inconvenience. See, e.g., *Colonial Capital Co. v. General Motors Corp.*, 29 F.R.D. 514 (D. Conn. 1961).

But when a protective order directly affects a party's First Amendment interest in freedom of speech or press, the language and logic of Civil Rule 26(c) both permit and demand that the threat to those constitutional interests be considered in

determining whether good cause exists for the issuance of the order. "Good cause" is designed to be a flexible standard which takes account of the strength of the conflicting interests present in different proceedings. Measuring "good cause" by a more exacting standard of need when protective orders impinge upon constitutional rights is thus consistent with the policy of and prevailing practice under the rules governing discovery.<sup>2</sup> Hence, under the "good cause" requirement, the Washington courts should have taken First Amendment interests into account and required a heightened showing of need before entering the protective order.

## II. THE PROTECTIVE ORDER APPROVED BY THE WASHINGTON COURTS VIOLATED THE FIRST AND FOURTEENTH AMENDMENTS.

### A. Protective Orders Restricting Communication Infringe Significant First Amendment Interests.

Protective orders that curb the right of parties to disseminate information are equivalent to "orders that prohibit the publication or broadcast of particular information or commentary" for which this Court has consistently demanded a "heavy burden" of justification to be met. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556, 558 (1976). See *In re Halkin*, 598 F.2d 176, 183-85 (D.C. Cir. 1979); *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 204 (S.D.N.Y. 1977). See also Note, Rule 26(c), Protective Orders and the First Amendment, 80 *Colum. L. Rev.* 1645, 1651 (1980).

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<sup>2</sup> Requiring the courts to be sensitive to First Amendment interests when formulating protective orders promotes the policies of the recent amendments to the Federal Rules of Civil Procedure. The amendments "contemplate greater judicial involvement in the discovery process," and suggest that it is a healthy process to require the judge to think through whether all of the parties' requested discovery is necessary, especially when competing concerns are evident. Fed. R. Civ. P. 26 advisory committee note (1983).

Whatever a protective order is called is not critical to this case. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-102 (1979). Regardless of the name, the order here directly restricts the right of the defendants to publish information that they would otherwise be free to print. By forcing unwilling parties to forgo certain speech and press activities while engaged in discovery proceedings, protective orders like the one entered here directly impinge upon significant First Amendment interests. See *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979); see also *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (*en banc*), *aff'd on other grounds*, 452 U.S. 89 (1981).

In a similar context, this Court has recognized the nature of the threat to litigants' constitutional rights posed by orders forbidding parties or their counsel to communicate information about pending litigation:

"Although we do not decide what standards are mandated by the First Amendment in this kind of case, we do observe that the order involves serious restraints on expression. This fact, at minimum, counsels caution on the part of a district court in drafting such an order, and attention to whether the restraint is justified by a likelihood of serious abuses."

*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103-04 (1981).<sup>3</sup> The Washington courts paid little attention to the serious restraints which this Court recognized in *Gulf Oil*. The concerns that motivated this Court's observations in *Gulf Oil* should guide it in interpreting Civil Rule 26(c) consistent with the First and Fourteenth Amendments.

<sup>3</sup> The order in *Gulf Oil*, which was issued pursuant to Fed. R. Civ. P. 23(d), forbade parties to a class action or their counsel from communicating with other class members without the approval of the court. The United States Court of Appeals for the Fifth Circuit had decided that the order constituted a prior restraint in violation of the First Amendment. *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (*en banc*). This Court, however, held that the order was an abuse of the court's supervisory powers, and therefore did not rule on the constitutionality of the order.

Court-ordered restrictions on a party's right to speak or publish during pretrial discovery represent "serious restraints of expression." If a party had not undertaken discovery in connection with a lawsuit, it would be free to "present its case" to the public.<sup>4</sup> That the documents or facts sought to be discussed were obtained through discovery procedures does not diminish at all the parties' interest in revealing or commenting on that information. Indeed, parties may have particular reasons for talking about information obtained in the course of litigation. If the party is normally engaged in an advocacy role, as are civil rights organizations and environmental groups, the subject matter of the litigation may be of critical importance to its regular activities. See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963). Private businesses may likewise wish to alert customers, potential clients or the industry to facts uncovered during litigation or to trial developments affecting it or its relations with others. A corporate defendant might wish to assure shareholders, creditors and other interested parties that lawsuits brought against it are ill-founded. Soliciting funds, generating support from persons with similar interests or claims, or making the public aware of problems which call for legislative action helpful to the litigant, all present genuine and tangible free press and free speech interests of parties involved in civil lawsuits.<sup>5</sup> The Washington

4 This Court has observed that, as a means for advocating the legal claims that a party may have, litigation is a protected First Amendment activity. See *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963). Protective orders restraining publications during trial or pre-trial proceedings therefore implicate not only the party's exercise of free speech and press outside the courtroom but also dilute the party's First Amendment interest in using the litigation to articulate publicly, on the basis of all available evidence, the validity of his claims.

5 In this regard, this Court has repeatedly found that the character or social utility of protected speech and published material does not alter the scope of its constitutional protection. It protects equally fact and political advocacy, the entertaining as well as the informative. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Supreme Court partially recognized this First Amendment interest by conceding that a court could not enter a protective order that would forbid a party from printing information obtained outside of the discovery process. 98 Wash. 2d at 257.

The immediate effect of the protective order here will be to prevent the defendants from publishing the information obtained in discovery. As a practical matter, it may also prevent them from publishing information obtained from other sources. As the court recognized in *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977):

It would be impractical, to the point of impossibility, for this Court to determine, if ostensibly protected information is later published, whether defendants came by it in the ordinary fashion, or through violation of our pre-trial order. Any attempts so to inquire would be unduly intrusive into journalistic sources, and have a chilling effect on First Amendment rights . . . . I find this argument to be the most powerful in opposition to the proposed order.

Because the Washington protective order attempts to draw distinctions among First Amendment rights based on the source of information, it inherently threatens discussion which the Washington courts readily admit to be privileged from judicial restraint.

Corresponding to a litigant's right to speak about his claims is the interest of the public in receiving information. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Virginia Pharmacy Board v. Virginia Pharmacy Council, Inc.*, 425 U.S. 748 (1976). The public interest in the operation of the judicial system in all of its phases has been repeatedly recognized. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Wood v. Georgia*, 370 U.S. 375 (1962); *Craig v. Harney*, 331 U.S. 367 (1947); *Bridges v. California*, 314 U.S. 252 (1941).



The general public may have a keen interest in the subject matter of the lawsuit if it involves issues of government, the economy or civil liberties. At the same time, essentially private disputes may be of intense concern to a more limited audience, whether to a segment of industry, a geographic locale or a special interest group. Parties may want to discuss information they discover about hazardous working conditions in certain factories or to warn others about actions by the Government which might directly affect them, such as the dissemination or control of harmful chemicals and other substances. Independent of these concerns, the public has an urgent interest in knowing that its judicial processes yield "true and accurate factfinding," the very function served by discovery in civil litigation. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980) (Brennan, J., concurring).

When a protective order restraining publication of information is imposed upon a newspaper that has been made a defendant to the litigation, the injury to First Amendment interests is particularly apparent. The very business of the press is informing the public about newsworthy information. This Court has recognized the special role the press plays in communicating facts and disseminating commentary that the public cannot easily obtain for itself, especially about judicial and governmental operations. "Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media . . . ." *Richmond Newspapers, Inc. v. Virginia*, *supra*, 448 U.S. at 577 n.12 (1980) (Burger, C.J.), 586 n.2 (Brennan, J., concurring). See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781-82 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). While the same free speech interests are implicated by protective orders restraining individuals from publicizing the events of their trial proceedings, protective orders applied to the press graphically demonstrate the threat posed to First Amendment rights and the profoundly disturbing impact on the right of citizens to receive information.

The courts below summarily concluded that plaintiffs' unspecified privacy interests and general concern for judicial administration justified the subordination of defendants' First Amendment rights. This Court has made clear, however, that "[d]esignating the conduct as an invasion of privacy. . . is not sufficient to support an injunction" against otherwise protected speech. *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). Purported governmental interests in effective judicial administration and fair trials have also given way to free press and speech interests. See *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946).

Indeed, only last year, this Court held that the press's First Amendment interests were not overcome by similar and more compelling interests than those advanced by the Washington Supreme Court. In *Globe Newspaper Co. v. Superior Court*, *supra*, the state attempted to justify a mandatory court closure rule on the ground that it was necessary to preserve the privacy of the minor sex victim and to encourage such victims to come forward and provide accurate testimony. Those articulated interests, as revealed in the circumstances of that case, were found insufficient to justify the broad rule created there. The protective order in this civil proceeding should receive no less strict scrutiny. Therefore, before a court may impose such an order upon parties as a condition to engaging in discovery, it must weigh the moving party's showing of good cause in a manner that is appropriately sensitive to the First Amendment interests at stake. See also *Elrod v. Burns*, 427 U.S. 347 (1976).

#### **B. The Washington Supreme Court Failed to Apply the Proper Constitutional Standard.**

All courts except the Washington Supreme Court have recognized that protective orders restraining speech or press activities infringe on First Amendment interests. These courts have articulated in different terms formulas to incorporate these values.

Thus, in weighing a claim by the press for access to sealed discovery materials, the Court of Appeals for the First Circuit held that a court must "look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary." *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981). The Court of Appeals for the District of Columbia Circuit applied a similar but more exacting standard for the issuance of such protective orders. *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). That Court determined that to issue the requested protective order, "the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." *Id.* at 191. See also *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476-77 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89 (1981); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975).

Since all protective orders restraining publication directly infringe on substantial First Amendment interests, they must be subject to the strictest scrutiny. However, because the record in this case does not support the protective order issued here even under the least stringent test formulated by the federal courts, this Court need not now decide how strong the showing must be before a protective order restraining speech will be upheld. It is clear that the Washington courts did not meet even the most basic standards that must be satisfied.

At a minimum, the First Amendment requires that a protective order limiting a party's right to publish information gained during discovery should not issue unless the court is able to "articulate in findings" that there is "an overriding interest" justifying the precise restriction sought to be imposed. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (Burger, C.J.). The moving party thus should demonstrate that the benefits to be gained from the protective order significantly outweigh the resulting harm to be imposed upon

the press and the public. Such a showing should be based upon particularized and precisely laid out facts. The nature of the information sought to be protected, whether the party seeking the order is a plaintiff or defendant, the exact harm sought to be prevented, and the nature of the claims involved in the litigation, may all properly be considered by the court in applying this constitutional standard.

In addition, a court should not issue a protective order that infringes the right of free press or free speech unless no alternative means exists to avoid the specified harms that is less intrusive upon the party's First Amendment interest. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968). In evaluating these standards, a court must determine that there is no other practical means by which to accomplish the avowed purpose of the protective order, that the order itself is precise and narrowly drawn, and that it will be effective to accomplish the desired end. See *Smith v. Daily Mail Publishing Co.*, *supra*, 443 U.S. at 105.

The Washington courts utterly failed to apply the good cause standard of Civil Rule 26(c) consistent with these constitutional principles. In making the initial determination whether to enter the order, the trial court observed that "Protective Orders are entered routinely." JA 52a. It held that the moving party need only have a "reasonable basis" for any request to restrict the use of information gained through discovery, regardless what opposing interests may be implicated. Furthermore, the court stated that it would "put access to the courts on an equal plane of importance with freedom of the press" JA 54a because it believed that *as a general matter* (and without regard to any particular facts before it) protective orders are necessary to prevent a chill on a party's willingness to prosecute his case.

Such a conclusory assertion of the general need for protective orders cannot satisfy the particularized evaluation required by the First Amendment. Rather than scrutinizing the specific circumstances prevailing in the proceeding before it, the trial

court categorically ruled that a litigant's mere perceived need for a protective order will always outweigh any intrusion upon free speech or free press rights imposed by the order.<sup>6</sup>

The Washington Supreme Court similarly failed to state any basis for its conclusion that the defendants' First Amendment interests had been properly considered and found outweighed by an overriding interest of plaintiffs. The Washington Supreme Court summarily concluded that, as a general rule, "the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the 'heavy burden' of justification." 98 Wash. 2d 256.<sup>7</sup> In short, the court held that First Amendment interests *never* suffice to override the entry of a protective order. Thus, in articulating the appropriate "good cause" test to be applied by the court under Civil Rule 26(c), the Washington Supreme Court entirely ignored defendants' First Amendment interests:

Our understanding of the rule, contrary to that of the federal circuit courts in *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) and *In re San Juan Star Co.*, 662 F.2d 108 (1st

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<sup>6</sup> This point is dramatized by the fact that the principal interest the court sought to balance against the First Amendment was the party's "willingness" to bring his case to court. Since even an irrational fear chills a "willingness" to litigate, a party need only utter his desire for a protective order to convince a Washington court to restrict another party's free press rights. The First Amendment does not tolerate restraints on free press simply to quell sheerly speculative fears. *Globe Newspaper Co. v. Superior Court*, *supra*, 457 U.S. at 609-10; *Nebraska Press Ass'n v. Stuart*, *supra*, 427 U.S. at 562; *Tinker v. Des Moines*, 393 U.S. 503, 509 (1969).

<sup>7</sup> The Washington Supreme Court had assumed for the purposes of its discussion and holding that the protective order was a prior restraint, which it admitted carried a "heavy presumption" against its constitutionality. 98 Wash. 2d at 231, 239, 256. The ease with which the Washington Supreme Court concluded that a protective order barring publication of discovery materials is *per se* constitutional under the First Amendment is incredible when assessed against the traditional strictness with which intrusions on free press rights have been viewed. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931).



Cir. 1981), is that good cause is established if the moving party shows *that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process*. In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. *The judge's major concern should be the facilitation of the discovery process and the protection of the integrity of that process*, which necessarily involves consideration of the privacy interest of the parties and, *in the ordinary case at least, does not require or condone publicity*.

98 Wash. 2d at 256 (emphasis added). This approach, which in effect creates a presumption in favor of protective orders, demonstrates that not even minimal regard was given the defendants' clear and legitimate interest in being free from restraints on their right to publish.

The Washington courts should have considered the extraordinary burden imposed upon the defendants' constitutional rights. The practical effect of the protective order is to curtail in midstream the *Seattle Times'* and *Union-Bulletin's* continuing coverage of a newsworthy story, one of particular interest to the newspapers whose veracity has been publicly challenged. In these circumstances, effectively forbidding relevant commentary by defendants until after a trial which may be months or years away, or even indefinitely,<sup>8</sup> is a serious infringement of the newspapers' right to convey matters of current interest to their readers without delay or prior judicial approval.

Poised against the considerable harm inflicted on defendants' First Amendment interests is surprisingly scant articulation in the record of any significant harm to plaintiffs that might be avoided by the protective order. In neither decision is there any finding of specific facts warranting the conclusion

<sup>8</sup> The protective order entered by the Washington courts has no termination date, and the courts provided no comfort to defendants that the order would be dissolved during the trial or even at its conclusion.

that plaintiffs would suffer actual harm to any privacy interest by public disclosure of the requested information.<sup>9</sup> Moreover, there has been no attempt to relate the requested documents to a specific privacy interest of the plaintiffs. Finally, there is no indication nor factual basis in the record to support the Washington court's principal reason for upholding the order: that these plaintiffs, or indeed any plaintiffs, will be inhibited in aggressively litigating their claims here or, more generally, from using the courts to pursue their lawful remedies.

Even if the courts had identified some specific harm that could be caused by the publication of materials produced in discovery, no effort was made to identify any alternative to a flat prohibition on publication that might have infringed less upon First Amendment interests. Appropriate redactions of the materials to be discovered, for example, could well have prevented the precise invasion of plaintiffs' privacy interest to which the Washington courts alluded. *Cf. Department of the Air Force v. Rose*, 425 U.S. 352 (1976). The court could also have sought to narrow the scope of the discovery request, to conduct an *in camera* examination of the materials, or even to delay discovery of these materials while the parties proceeded to examine less sensitive documents. *See Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1983).

Finally, the court should have considered the extent to which the protective order would be effective. The issue was not, as the Washington courts branded it, whether defendants would abide by the order. The question is whether—through a variety of other sources such as former members of the Aquarian Foundation and other investigations—the same material would be given to the public in any event. It would also have been appropriate for the court to consider the likelihood that the information will become part of the public record at trial. The Washington courts did not even examine these questions.

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<sup>9</sup> The trial court specifically struck language in the order that would have specified the court's reliance on plaintiffs' contentions concerning their purported interests of privacy and freedom of association and religion. JA 64a.

## CONCLUSION

Under the rule announced by the Washington Supreme Court, there is no breathing space in Civil Rule 26(c) for the First Amendment. The court did not attempt to evaluate the facts that could have led it to make an informed and sensitive assessment of the First Amendment concerns raised in this proceeding. We urge this Court to recognize the failure of the Washington courts to apply the constitutionally mandated standard, and to vacate the judgment of the Washington Supreme Court and remand it for a determination as to the order, if any, which may be entered under Civil Rule 26 consistent with this opinion.

Respectfully submitted,

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No. 82-1721-CSX  
Status: GRANTED

Title: Seattle Times Company, et al., Petitioners  
v.  
Keith Milton Rhinehart, et al.

Docketed:  
April 22, 1983

Court: Supreme Court of Washington

Counsel for petitioner: Schwab, Evan L.

Counsel for respondent: Edwards, Malcolm L.

Entry	Date	Note	Proceedings and Orders
1	Apr 22 1983	G	Petition for writ of certiorari filed.
3	May 16 1983		Order extending time to file response to petition until June 25, 1983.
4	Jun 25 1983		Brief of respondents Keith M. Rhinehart, et al. in opposition filed.
5	Jun 29 1983		DISTRIBUTED. September 26, 1983
7	Oct 3 1983		Petition GRANTED.
			*****
8	Nov 16 1983		Brief of petitioners Seattle Times Co., et al. and JCINT APPENDIX filed.
9	Nov 17 1983	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
12	Nov 28 1983		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
13	Dec 16 1983		Brief of respondents Keith M. Rhinehart, et al. filed.
14	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 21, 1984. (3rd case)
15	Jan 11 1984		CIRCULATED.
16	Jan 10 1984		Record filed.
17	Jan 10 1984		Certified original record (Box) received.
18	Feb 2 1984	X	Reply brief of petitioners Seattle Times Co., et al. filed.
19	Feb 14 1984	D	Motion of respondent Keith Milton Rhinehart to present oral argument pro se and for divided argument filed.
20	Feb 14 1984	D	Motion of Malcolm L. Edwards, Esquire, to permit Haim Habib, Esquire, to present oral argument pro hac vice on behalf of respondents filed.
21	Feb 15 1984		DISTRIBUTED. February 17, 1984. (Above motions).
22	Feb 21 1984		Motion of respondent Keith Milton Rhinehart to present oral argument pro se and for divided argument DENIED.
23	Feb 21 1984		Motion of Malcolm L. Edwards, Esquire, to permit Haim Habib, Esquire, to present oral argument pro hac vice on behalf of respondents DENIED.
24	Feb 21 1984		ARGUED.